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No.

In the Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional provision and statute involved	2
Statement	5
A. The Board proceedings	5
B. The decision of the court of appeals	9
Reasons for granting the petition	12
Conclusion	24
Appendix A	1a
Appendix B	51a
Appendix C	53a
Appendix D	69a
Appendix E	85a
Appendix F	92a

CITATIONS

Cases:

Association of Hebrew Teachers of Metropolitan Detroit (United Hebrew Schools), 210 NLRB 1053	7
Associated Press v. *National Labor Relations Board*, 301 U.S. 103	17, 18
Board of Education v. *Allen*, 392 U.S. 236	15, 22
Board of Jewish Education of Greater Washington, D.C., 210 NLRB 1037	7

Cases—Continued

	Page
Braunfeld v. *Brown*, 366 U.S. 599	13, 21
Broadrick v. *Oklahoma*, 413 U.S. 601	19
Cantwell v. *Connecticut*, 310 U.S. 296	13
Cap Santa Vue, Inc. v. *National Labor Relations Board*, 424 F. 2d 883	21
Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles, 223 NLRB 1218, pending on petition for review, C.A. 9, No. 77-1286	8
Cornell University, 183 NLRB 329	7
Grutka v. *Barbour*, 549 F. 2d 5, certiorari denied, 431 U.S. 908	18
H. K. Porter Co. v. *National Labor Relations Board*, 397 U.S. 99	16
Hammond v. *United Papermakers & Paperworkers Union*, 462 F. 2d 174, certiorari denied, 409 U.S. 1028	21
Henry M. Hald High School Association, 213 NLRB 415	23
Lemon v. *Kurtzman*, 403 U.S. 602	9, 15, 20
Linscott v. *Millers Falls Co.*, 440 F. 2d 14, certiorari denied, 404 U.S. 872	21
Meek v. *Pittenger*, 421 U.S. 349	9
Mitchell v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879, certiorari denied, 347 U.S. 1013	21
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1	21
National Labor Relations Board v. *Mercy College*, 536 F. 2d 544	7
National Labor Relations Board v. *Reliance Fuel Oil Corp.*, 371 U.S. 224	22

Cases—Continued

	Page
National Labor Relations Board v. *Roman Catholic Diocese of Brooklyn*, 535 F. 2d 1387	23
National Labor Relations Board v. *Wentworth Institute*, 515 F. 2d 550	7
Nazareth Regional High School v. *National Labor Relations Board*, 549 F. 2d 873	23
Pacific Union Conference of Seventh-Day Adventists v. *Marshall*, No. A-81, decided August 2, 1977	18
Parker v. *Commissioner*, 365 F. 2d 792, certiorari denied, 385 U.S. 1026	21
Picker Corporation, 222 NLRB 296	17
Prince v. *Massachusetts*, 321 U.S. 158	21
Railway Employes' Dept. v. *Hanson*, 351 U.S. 225	22
Rescue Army v. *Municipal Court of Los Angeles*, 331 U.S. 549	18
Roemer v. *Board of Public Works of Maryland*, 426 U.S. 736	19
Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools, 216 NLRB 249	8
Serbian Eastern Orthodox Diocese v. *Milivojevich*, 426 U.S. 696	18
Sherbert v. *Verner*, 374 U.S. 398	13
United States v. *Kissinger*, 250 F. 2d 940, certiorari denied, 356 U.S. 958	21
United States v. *Raines*, 362 U.S. 17	19
United States v. *Reynolds*, 98 U.S. 145	13
Watchtower Bible & Tract Society v. *Los Angeles County*, 181 F. 2d 739, certiorari denied, 340 U.S. 820	21

Cases—Continued Page

Wisconsin v. *Yoder*, 406 U.S. 205 ..... 13, 21
Wolman v. *Walter*, No. 76-496, decided June 24, 1977 15
Yott v. *North American Rockwell Corp.*, 501 F. 2d 398 21

Constitution, statutes, and regulation:

United States Constitution, First Amendment ..... *passim*
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) 2

Section 1, 29 U.S.C. 151 2
Section 2(2), 29 U.S.C. 152(2) 3
Section 7, 29 U.S.C. 157 ..... 3, 17
Section 8(a), 29 U.S.C. 158(a) 3, 16
Section 8(a)(1), 29 U.S.C. 158(a)(1) 3, 6, 8
Section 8(a)(5), 29 U.S.C. 158(a)(5) 4, 6, 8
Section 8(d), 29 U.S.C. 158(d) 16
Section 9(a), 29 U.S.C. 159(a) 4
Section 9(c)(1), 29 U.S.C. 159(c)(1) 4, 6
Section 9(c)(1)(A), 29 U.S.C. 159(c)(1)(A) 4
Section 14(c)(1), 29 U.S.C. 164(c)(1) 22

29 U.S.C. 103.1 7

Miscellaneous: Page

Hearings on H.R. 8410 (Labor Reform Act of 1977) before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 95th Cong., 1st Sess. (1977) 14
"Mater et Magistra," an encyclical of Pope John XXIII on Christianity and Social Progress (May 15, 1961), reprinted in *The Encyclicals and Other Messages of John XXIII* (1964) 14
Official Catholic Directory (1977) 12
Pope Leo XIII, *Rerum Novarum* (Parkinson ed. 1924) 14

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 559 F. 2d 1112. The decisions and orders of the National Labor Relations Board (Apps. C and D, *infra*) are reported at 224 NLRB 1221 and 224 NLRB 1226.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on August 3, 1977. On October 20, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether application of the National Labor Relations Act to schools operated by the Roman Catholic Church, which teach both religious and secular subjects, violates the Establishment or Free Exercise Clauses of the First Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

Section 1. * * *

* * * * *

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

Section 2(2) The term "employer" includes any person acting as an agent of any employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof * * *.

* * * * *

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also nave the right to refrain from any or all such activities * * *.

* * * * *

Section 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Section 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *.

* * * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

STATEMENT

A. The Board Proceedings

Respondent The Catholic Bishop of Chicago, a corporation sole, operates two parochial secondary schools, Quigley North and Quigley South, in Chicago, Illinois. The schools' academic and extracurricular programs, as well as their admissions and vocational guidance policies, indicate that they are essentially college preparatory high schools. Students are offered a wide range of courses in mathematics, English, social studies, sciences, foreign languages, fine arts and physical education, in addition to a required course on religion for one period (45 minutes) three or five days a week, and enjoy supervised after-school activities (such as debating, science fairs, athletic competition against other private and public schools, drama and music instruction and social events) typical of many secular high schools. The Quigleys are accredited by the North Central Association of Secondary Schools and Colleges, are "fully recognized" by the State of Illinois (a form of certification beyond minimum state requirements), and are subject to state laws concerning curriculum and attendance (Tr. 336-338, 344-349, 393-397, 403, 425, 515-530, 553, 637, 650, 686).[1] Respondent Diocese of Fort

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[1] "Tr." refers to the transcript of the Quigley representation proceeding before the Board. Although admission to the Quigley schools is generally limited to boys who demonstrate some interest in the priesthood or a "potential for Christian leadership" (Tr. 608, 778-779), few of the schools' graduates

Wayne-South Bend, Inc., operates five parochial secondary schools in northeastern Indiana that are similar to the Quigley schools except that they apparently have a lower "degree of religious orientation" (App. A, *infra*, p. 4a, n. 5).

In September and October 1975, pursuant to separate representation petitions filed by the Quigley Education Association, an affiliate of the Illinois Education Association, and the Community Alliance for Teachers of Catholic High Schools (the "Unions") under Section 9(c)(1) of the National Labor Relations Act, 29 U.S.C. 159(c)(1), elections were conducted in units composed of all lay faculty members at the high schools (App. E, *infra*, p. 85a; App. F, *infra*, p. 92a).[2] The Unions won the elections and were certified as the exclusive bargaining representatives of the employees in the two units. After respondents (the "Employers") refused to bargain with the Unions, the Regional Director issued complaints alleging that the Employers' conduct violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). The Employers admitted their refusal to

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ever become priests. The majority go on to public or private college and secular employment. No evidence was presented that any similar limitation is placed on admission to the Indiana schools.

[2] The unit at the Quigley schools consisted of 46 teachers, while the unit at the Indiana schools (South Bend St. Joseph High School, Mishawaka Marian High School, Fort Wayne Bishop Luers High School, Fort Wayne Bishop Dwenger High School and Huntington Catholic High School) consisted of approximately 182 teachers.

bargain but contended, as they had in the earlier representation proceedings, that the schools involved were "completely religious" and thus that the Board should decline to assert jurisdiction under its discretionary standard.[3] They further argued that, in any event, the Board's assertion of jurisdiction over such schools was prohibited by the First Amendment (App. C, *infra*, pp. 55a-56a; App. D, *infra*, p. 71a).

The Board held that the Employers were not entitled to relitigate the determinations made in the representation proceedings that the schools, while religiously associated, were not completely religious and that they therefore satisfied the Board's discretionary standard for asserting jurisdiction (App. C, *infra*, pp. 58a-59a; App. D, *infra*, p. 74a).[4] The

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[3] In *Cornell University*, 183 NLRB 329, 334, the Board announced that it would assert jurisdiction over nonprofit, private educational institutions that met a specified dollar-volume standard (at present, gross annual revenues of $1 million or more, 29 C.F.R. 103.1). See *National Labor Relations Board* v. *Mercy College*, 536 F. 2d 544 (C.A. 2); *National Labor Relations Board* v. *Wentworth Institute*, 515 F. 2d 550 (C.A. 1). However, in *Board of Jewish Education of Greater Washington, D.C.*, 210 NLRB 1037, the Board determined that, even where this dollar standard had been satisfied, it would decline to assert jurisdiction over "institutions primarily religious and noncommercial in character and purpose, whose educational endeavors are limited essentially to furthering and nurturing their religious beliefs," because to do so "would not effectuate the policies of the Act." See also *Association of Hebrew Teachers of Metropolitan Detroit (United Hebrew Schools)*, 210 NLRB 1053, 1058.

[4] In the Quigley representation proceeding, the Board explained that its "policy is to decline jurisdiction over religiously sponsored organizations 'only when they are completely

Board also rejected the Employers' constitutional claims for the reasons set forth in *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles*, 223 NLRB 1218, pending on petition for review, C.A. 9, No. 77-1286, which it summarized as follows (App. C, *infra*, pp. 58a-59a; App. D, *infra*, p. 74a):

> (1) the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; (2) the provisions of the Act do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion of religious conduct and is necessary to obtain that objective.

Accordingly, the Board concluded that the Employers had violated Section 8(a)(5) and (1) of the Act, and

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religious, not just religiously associated'" (App. E, *infra*, p. 86a), quoting from *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 NLRB 249, 250. The Board found that the two Chicago high schools "operate primarily as college preparatory schools within the class over which the Board has heretofore asserted jurisdiction"; that, "[a]s to the 1974 graduating class, the most recent prior to the hearing, only 16 percent of the class went on to Niles College," the Diocesan Seminary College; that "the academic curriculum is similar to that of other high schools, both private and public"; and that "the Quigley schools also maintain a substantial number of extracurricular activities including interschool sports and intramural activities similar to those engaged in by students in other high schools" (App. E, *infra*, pp. 87a-88a). A similar determination was made with respect to the high schools in *Diocese of Fort Wayne-South Bend* (App. F, *infra*, p. 93a, n. 2).

it ordered them to cease and desist from the unfair labor practices and to bargain collectively with the Unions (App. C, *infra*, pp. 65a-67a; App. D, *infra*, pp. 81a-82a).

B. The Decision of the Court of Appeals

The court of appeals denied enforcement of the Board's orders (App. A, *infra*). Initially, the court concluded that the Board's determination that the schools involved here were not "completely religious" and, hence, were within the Board's jurisdictional standard, was an abuse of discretion in light of this Court's recent decisions involving state aid to parochial schools, in which such schools "had been generically labeled in a manner which appeared to be inconsistent with a constitutional basis for differentiating between 'completely religious' and 'religicusly associated'" (*id.* at 21a).[5]

Having rejected the Board's discretionary attempt to exempt certain religious schools from its jurisdiction, the court of appeals went on to decide "the larger constitutional question," because "it would follow that the Board would necessarily have to as-

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[5] Specifically, the court of appeals relied on statements in *Lemon* v. *Kurtzman*, 403 U.S. 602, and *Meek* v. *Pittenger*, 421 U.S. 349, that parochial schools are "'an integral part of the religious mission of the Catholic Church'" involving "substantial religious activity and purpose" (*Lemon, supra*, 403 U.S. at 616), and that the "'secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence" (*Meek, supra*, 421 U.S. at 366).

sert jurisdiction over all religious schools in view of the otherwise inclusive scope of the statute under which it operates" (App. A, *infra*, p. 27a). The court concluded that the Board's assertion of jurisdiction over parochial schools violated the Establishment and Free Exercise Clauses of the First Amendment.* It found that "the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools." Religious officials would "[n]o longer * * * be the sole repository of authority as required by church law," but would have "to share 'some decision-making' with the union" (*id.* at 27a). Moreover, in the court's view, the "Board's order to bargain unquestionably * * * inhibits the bishops' authority to maintain parochial schools in accordance with ecclesiastical concern" (*id.* at 29a-30a):

> If a bishop, for example, should refuse to renew all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of the institutions, or because he wanted to replace lay teachers with religious-order teachers who

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* The court of appeals made no distinction between the two Religion Clauses of the First Amendment and instead blended its discussion of "free exercise" and "establishment" principles because of its "belief that there has been some blurring of sharply honed differentiations" (App. A, *infra*, p. 48a). It found that the Board's involvement in the labor relations of church-related schools ran afoul of both Clauses, which have "the identical purpose of maintaining a separation between Church and State" (*id.* at 49a).

> had become available, under ecclesiastical law he would have the right if not the duty to take that action. Yet, under the National Labor Relations Act, he might well be found guilty of an unfair labor practice. * * * The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to "steer far wider of the unlawful zone" of impermissible conduct. * * * If, for example, a teacher should give a strong pro-union speech at a meeting one week and the next week would advocate the cause of birth control to his or her students or favor the availability to poor people of abortion, the bishop would be confronted with a choice of foregoing his right to discharge the heretical employee or do so at the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs.

Although the court of appeals noted that the Act's imposition of a bargaining obligation inevitably results in some restriction on every covered employer's freedom to conduct his business, it concluded that such restrictions, while justified "on the general industrial and commercial scene" by sound legislative policy considerations, must give way when they conflict with the First Amendment (App. A, *infra*, p. 30a). The court also distinguished "permissible gov-

ernmental impingements upon the operation of the church schools," such as fire inspections, zoning laws, and state compulsory attendance requirements, on the ground that such regulations, unlike a Board bargaining order, have no "clear inhibiting potential upon the relationship between teachers and employers" (*id.* at 30a-31a). Finally, the court observed that such regulations applied equally to all schools, whereas the Board's determination to assert jurisdiction over parochial schools did not apply to public schools, which are expressly exempted from the statutory definition of "employer" (*id.* at 32a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals that application of the National Labor Relations Act to parochial schools is prohibited by the Free Exercise and Establishment Clauses of the First Amendment is erroneous and constitutes a serious departure from the principles that this Court has consistently applied in determining whether the application of government regulatory programs to religious institutions offends the Constitution. Moreover, the question decided by the court below is an important one; its decision would restrict the reach of the Act in a significant, sensitive area involving some 10,000 schools and more than 100,000 lay teachers throughout the nation.[7]

[7] There are 107,856 lay faculty members alone in the 9,976 primary and secondary schools affiliated with the Catholic Church in the United States. *Official Catholic Directory*, general summary, pp. 1-2 (1977).

1. The First Amendment provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," embraces two concepts, "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304. It is therefore settled that the "freedom to act, even when the action is in accord with one's religious convictions," may be reasonably restricted by neutral legislation. *Braunfeld* v. *Brown*, 366 U.S. 599, 603. See *United States* v. *Reynolds*, 98 U.S. 145, 166. However, only those governmental "interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215. Accordingly, where it is claimed that regulation "interferes with the practice of a legitimate religious belief, it must appear either that the [government] does not deny the free exercise of religious belief by its requirement, or that there is a [governmental] interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id.* at 214. See also *Sherbert* v. *Verner*, 374 U.S. 398, 403. Application of these principles demonstrates that the Board's orders in these cases do not violate the First Amendment.

a. The purpose of the National Labor Relations Act, to encourage the practice and procedure of collective bargaining in order to preserve industrial

peace and protect workers' rights, is entirely secular. Moreover, the Employers have never alleged that bargaining with a union is contrary to their religious beliefs;[8] they assert only that the First Amendment prohibits a governmentally-imposed order to do so. However, the contention that parochial school operations must be exempt from the requirements of general legislation merely because they have a religious purpose has been rejected in a variety of other contexts. Such schools are not immune from regulations such as fire inspections, zoning ordinances, health and safety standards, minimum wage laws, compulsory attendance requirements, or a number of other governmental restrictions that may have an unintended, incidental effect upon the schools' religious operations. See *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614.[9]

[8] To the contrary, leaders of the Catholic Church have consistently defended "the worker's natural right to enter into association with his fellows" for the purpose of bargaining collectively with their employer and have recognized the duty of government "to protect the rights of all its people, and particularly of its weaker members, the workers * * *." "Mater et Magistra," an encyclical of Pope John XXIII on Christianity and Social Progress (May 15, 1961), reprinted in *The Encyclicals and Other Messages of John XXIII*, 255-256 (1964). See also Pope Leo XIII, *Rerum Novarum* (Parkinson ed. 1924); Hearings on H.R. 8410 (Labor Reform Act of 1977) before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 95th Cong., 1st Sess. 411-423 (1977) (testimony of Monsignor George C. Higgins, Secretary for Research of the United States Catholic Conference).

Although the court of appeals acknowledged that religious institutions may be subjected to reasonable governmental regulation (App. A, *infra*, pp. 30a-31a), it concluded that the requirements of the Act were impermissible because they would impose a "chilling aspect" on "the exercise of the bishops' control of the religious mission of the schools" (*id.* at 29a). The court explained that school officials might be induced to forego their right to take a bargaining

[9] The fact that church schools must comply with these regulations also undermines the court's view that the denial of government financial aid to parochial schools entitles them to be free of obligations under the Act (App. A, *infra*, p. 46a). The court's grounds for distinguishing other regulation of parochial schools do not withstand analysis. For example, in furtherance of the State's interest "in insuring that its youth receive an adequate secular education," the State may require that parochial schools only employ teachers with adequate qualifications and "may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Wolman* v. *Walter*, No. 76-496, decided June 24, 1977, slip op. 9. See also *Board of Education* v. *Allen*, 392 U.S. 236, 245-246. These requirements may well have a "clear inhibiting potential upon the relationship between teachers and employers" in parochial schools. (App. A, *infra*, p. 31a). Nor may fire inspection, school attendance and similar laws be distinguished on the ground that they are applicable to all schools, whereas public schools are expressly excluded from the Act (*id.* at 32a). Congress' exclusion of government instrumentalities from the statutory coverage is irrelevant to the question whether there is a constitutional bar to an extension of the Act to all employees of private employers whose operations affect commerce. The Act applies to private secular schools no less than to private religious schools.

position required by church doctrine or to fire a heretical employee who is also a union adherent because the exercise of these rights would entail "the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs" (*id.* at 30a). However, the assumption of the court below that subjecting parochial schools to the Board's jurisdiction would "chill" school officials in the free exercise of their religious beliefs and would unduly entangle the Board in religious affairs rests upon an erroneous understanding of the structure of the Act and the Board's role in enforcing its provisions.

Although the Board's orders require employers and unions to bargain in good faith about wages, hours, and other terms and conditions of employment, the Board is in no sense a participant at the negotiating table, nor can it compel a party to make any concessions or to agree to any substantive contractual provision. See 29 U.S.C. 158(d); *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99. Similarly, in determining whether the firing of an employee (or any other employer business decision) may have constituted an unfair labor practice, the Board's concern focuses solely on the secular issue of anti-union conduct, not the substantiality of the employer's alleged motivation for his actions. See 29 U.S.C. 158(a). Thus, if a church official were to contend that an employee, allegedly discharged for union activity, was in fact fired for espousing hereti-

cal views, the Board's role would be limited to a determination whether the employer's alleged reason for the discharge was the actual one; once it were determined that the employee had not been removed or disciplined in an effort to interfere with rights guaranteed by Section 7 of the Act, 29 U.S.C. 157, the Board's inquiry would end. If the employee had been discharged because of the employer's belief that he or she was unqualified to teach in a parochial school, the "validity as a part of church doctrine" (App. A, *infra*, p. 33a) of that belief would play no part in the Board's decision. See, *e.g.*, *Associated Press* v. *National Labor Relations Board*, 301 U.S. 103, 131-132; *Picker Corporation*, 222 NLRB 296, 300-301.

Although the Board's assertion of jurisdiction over parochial schools may well require church officials on occasion to justify actions alleged to have been taken in violation of the Act, there is no reason to believe that the necessity of proving to the satisfaction of the Board or the courts that a bargaining position was asserted in good faith or that an employee was not discharged for a prohibited reason would deter such officials from taking that action. The court of appeals offered no evidence that other employers subject to the Act have compromised their authority to manage their businesses out of fear of Board scrutiny of their decisions. Moreover, this speculative concern, even if legitimate, would not support a blanket exemption from the Act. The courts and administrative agencies may not intrude into

essentially religious controversies (*Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696), but a religious institution is not relieved of the obligation to defend its position in a lawsuit over secular issues simply because of its status or the context in which the dispute has arisen. See *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549; *Grutka* v. *Barbour*, 549 F. 2d 5 (C.A. 7), certiorari denied, 431 U.S. 908. See also *Pacific Union Conference of Seventh-Day Adventists* v. *Marshall*, No. A-81, decided August 2, 1977 (Rehnquist, Circuit Justice).

In any event, even if there were a possibility that the Board in a future case might inquire into the validity of a doctrinal position in the course of an unfair labor practice proceeding, that would provide no justification for holding the Act unconstitutional as applied in the present cases, where the Employers did not seek to justify their refusal to bargain on any church doctrine, the legitimacy of their religious beliefs was not at issue, and the prospect of an impermissible governmental entanglement with or impairment of religious affairs was wholly conjectural. As this Court stated in *Associated Press* v. *National Labor Relations Board*, *supra*, 301 U.S. at 131-132, in rejecting a similar claim that application of the Act to a newspaper would lead to inevitable interference with the First Amendment guarantee of freedom of the press:

> The ostensible reason for Watson's discharge, as embodied in the records of the petitioner, is "solely on the grounds of his work not being on a basis for which he has shown capability." * * * The actual reason for his discharge, as shown by the unattacked finding by the Board, was his Guild activity and his agitation for collective bargaining. The statute does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner. These considerations answer the suggestion that if the petitioner believed its policy of impartiality was likely to be subverted by Watson's continued service, Congress was without power to interdict his discharge. No such question is here for decision. Neither before the Board, nor in the court below, nor here has the petitioner professed such belief. It seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances.

See also *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 761; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610; *United States* v. *Raines*, 362 U.S. 17, 21.[10]

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[10] The court of appeals' conclusion that the mere "possibility of entanglement" in future cases is enough to render the Act unconstitutional as applied to the Employers (App. A, *infra*, p. 36a) also ignores the fact that, if the Board were ever to issue an order that invaded First Amendment rights, there would be ample opportunity under the Act to obtain judicial review before the order is enforced. Hence, the Board's assertion of jurisdiction over private religious schools does not present the "comprehensive, discriminating, and con-

In sum, the Employers' position amounts in essence to the claim that they have a constitutional right to commit unfair labor practices—that, even though their businesses fall within the language of the Act, they may refuse to bargain with the representatives of their employees and may discharge or otherwise discriminate against employees because of union activity. They make this claim despite their concession that their religious beliefs do not sanction, much less require, the conduct of their labor relations in a manner found by Congress to be contrary to the public interest. Rather, the Employers contend that the Board, in determining whether an unfair labor practice may have been committed, necessarily would be forced to intrude into prohibited areas. Because these fears are unfounded or, at the very least, speculative, the court of appeals erred in denying enforcement of the Board's orders.

b. As noted above, the Employers have never contended that the Board's bargaining orders would require them to take action inconsistent with their religious beliefs. Even if the Board's assertion of jurisdiction over parochial schools could be shown to regulate conduct that was based upon religious convictions, however, such regulation would be permis-

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tinuing state surveillance" (*Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 619) found to be inherent in some school aid programs.

sible if justified by a compelling state interest. *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 214.[11]

The National Labor Relations Act reflects Congress' judgment that the denial of the right of employees to organize and to bargain through representatives of their own choosing is likely to lead to strikes and other activity that would disrupt the free flow of commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42. The courts have repeatedly recognized the importance of this federal concern in rejecting claims that the Act's mandatory bargaining (*Cap Santa Vue, Inc.* v. *National Labor Relations Board*, 424 F. 2d 883, 890 (C.A. D.C.)) and union shop (*Yott* v. *North American Rockwell Corp.*, 501 F. 2d 398, 403 (C.A. 9); *Hammond* v. *United Papermakers & Paperworkers Union*, 462 F. 2d 174, 175 (C.A. 6), certiorari denied, 409 U.S. 1028; *Linscott* v. *Millers Falls Co.*, 440 F. 2d 14, 17-18 (C.A. 1), certiorari denied, 404 U.S. 872)

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[11] See, *e.g.*, *Braunfeld* v. *Brown*, 366 U.S. 599 (state law barring retail sales on Sunday); *Prince* v. *Massachusetts*, 321 U.S. 158 (state child labor law); *Parker* v. *Commissioner*, 365 F. 2d 792, 795 (C.A. 8), certiorari denied, 385 U.S. 1026 (federal income tax law); *United States* v. *Kissinger*, 250 F. 2d 940, 943 (C.A. 3), certiorari denied, 356 U.S. 958 (federal agricultural marketing law); *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879, 884-885 (C.A. 7), certiorari denied, 347 U.S. 1013 (federal minimum wage law); *Watchtower Bible & Tract Society* v. *Los Angeles County*, 181 F. 2d 739 (C.A. 9), certiorari denied, 340 U.S. 820 (state property tax law).

provisions must yield to conflicting religious beliefs.[12] The danger of economic strife if workers in religious schools were deprived of the opportunity to engage in collective bargaining or other concerted activity justified the determination of Congress not to exempt such schools from the rights and obligations imposed on all other private employers and employees engaged in operations that affect commerce.[13] Parochial schools are in many ways indistinguishable from the private high schools that are within the Board's jurisdiction; there is no justification for a complete disparity in the treatment of their labor relations. See *Board of Education* v. *Allen*, 392 U.S. 236, 248.

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[12] Cf. *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 236-238 (rejecting First Amendment challenge to union security provisions of Railway Labor Act, 45 U.S.C. 152, Eleventh).

[13] Although Congress vested in the Board the "fullest jurisdictional breadth" possible under the Commerce Clause of the Constitution (*National Labor Relations Board* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226), the Board has chosen to confine its jurisdiction to those schools that have a substantial impact on commerce, as measured by gross annual revenues and other factors. See note 3, *supra*. The court of appeals misconceived the purpose of the Board's discretionary jurisdictional standard in concluding that it was inconsistent with this Court's recent decisions involving public aid to church-related schools (App. A, *infra*, pp. 14a-26a). The Board's standard does not rest on the premise that the Constitution draws a distinction between "completely religious" and other religious institutions, but rather reflects its judgment of how best to effectuate the policies of the Act. The court should therefore have deferred to the Board's discretionary determination. See 29 U.S.C. 164(c)(1).

2. There are more than 10,000 parochial schools in the United States. A number of these schools have acquiesced in coverage under the Act with no claim of abridgement of religious freedom, although raising the sort of issues litigated by employers generally (see, *e.g.*, *National Labor Relations Board* v. *Roman Catholic Diocese of Brooklyn*, 535 F. 2d 1387 (C.A. 2); *Henry M. Hald High School Association*, 213 NLRB 415), while in others the collective bargaining process has been working smoothly.

The court of appeals' decision jeopardizes this spirit of cooperative labor relations by encouraging employers to challenge the Board's assertion of jurisdiction over their schools on First Amendment grounds[14] and threatens to deprive thousands of employees throughout the United States of the protection of the Act. Accordingly, review by this Court is warranted.

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[14] In *Nazareth Regional High School* v. *National Labor Relations Board*, 549 F. 2d 873 (C.A. 2), for example, the employer, a parochial high school, sought review of a Board finding that it had committed several unfair labor practices. After enforcement of the Board's order had been granted in part, the employer sought rehearing on the basis of the court of appeals' decision in this case, raising for the first time the constitutional issue presented here. The employer's motion for leave to file its petition for rehearing out of time was denied on November 14, 1977. Appeals challenging the constitutionality of the Act as applied to religiously-affiliated schools are also *sub judice* in the Third, Seventh and Ninth Circuits. *Caulfield* v. *Hirsch*, C.A. 3, Nos. 77-2021 and 77-1972; *Gordon Technical High School, Directed by the Congregation of the Resurrection* v. *National Labor Relations Board*, C.A. 7, No. 77-1583; *Cardinal Timothy Manning* v. *National Labor Relations Board*, C.A. 9, No. 77-1286.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1977.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 76-1600

THE CATHOLIC BISHOP OF CHICAGO,
a corporation sole, PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD,
RESPONDENT,

and

THE ILLINOIS EDUCATION ASSOCIATION, INTERVENOR.

No. 76-1638

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.,
PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

On Petitions for Review and Cross-Applications for Enforcement of Orders of the National Labor Relations Board

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Argued January 21, 1977—Decided August 3, 1977

Before CUMMINGS, PELL, and SPRECHER, *Circuit Judges.*

PELL, *Circuit Judge.* The First Amendment to the Constitution of the United States specifies that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. The cases before us present the issue of whether this constitutional prohibition (sometimes called a high and impregnable wall,[1] but more recently characterized as being a blurred, indistinct, variable barrier depending on all the circumstances of a particular relationship[2]) serves to prevent the National Labor Relations Board, which functions pursuant to an Act of Congress, from exercising jurisdiction over two groups of secondary diocesan schools operated by the Roman Catholic Church.

On June 12, 1974, the Quigley Education Association, an affiliate of the Illinois Education Association, intervenor herein, filed a representation petition with the Board seeking to represent a bargaining unit composed of lay teachers employed at Quigley Seminary North and Quigley Seminary South, secondary schools located in the City of Chicago and operated by The Catholic Bishop of Chicago, a corporation sole, one of

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[1] *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947).

[2] *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971).

the employers[3] herein. On June 4, 1975, the Community Alliance, the other union here involved, filed a representation petition with the Board seeking to represent a bargaining unit composed of lay teachers employed at five diocesan high schools,[4] operated by the Diocese of Fort Wayne-South Bend, Inc., one of the employers, in Northeastern Indiana.[5]

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[3] Throughout this opinion we shall generally use the terms employers and bishops interchangeably. Under Canon Law, the bishops are technically known as Ordinaries. Under the laws of Illinois and Indiana, there are some differences in the way in which the bishops have organized their dioceses for purposes of adhering to the neutral and secular requirements of state law. By the Act of February 20, 1861, the General Assembly of Illinois transformed the then Catholic Bishop of Chicago, and his successors in office, into a body politic, and a corporation sole, under the name and style of "The Catholic Bishop of Chicago." In Indiana, the bishop operates the diocese through a not-for-profit corporation. For the purposes of this opinion, we will not incorporate distinctions between the corporate entities and the persons of the Ordinaries.

[4] All church operated schools, at least through the secondary level, are frequently generically referred to by the public as parochial schools. Technically, parochial schools would appear to be those established by the parish and the high schools such as those involved in the present cases would be properly characterized as diocesan institutions. *See* T. BOUSCAREN AND A. ELLIS, CANON LAW: A TEXT AND COMMENTARY 746 (3d rev. ed. 1957). Nevertheless, noting that Webster's Third International Dictionary gives a gloss to the popular usage by defining "parochial school" as "[a] school maintained by a religious body usually for elementary instruction," and because of reference herein to the so-called parochaid cases, we, on occasion, will use the publicly understood reference.

[5] If the religious saturation of the Chicago schools as opposed to the Indiana schools should be significant, it appears clear

In the representation hearings conducted during 1975, the employers contended, *inter alia*, that the Board should decline jurisdiction under its own jurisdictional criteria, and that in any event the First Amendment prohibited the Board's taking jurisdiction of these schools. The employers' jurisdictional arguments were rejected on the basis of the Board's decisions in *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 NLRB 249 (1975); and *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles, a Corporation Sole, Etc.*, 223 NLRB 1218 (1976). Elections were ordered in one unit of all the lay faculty at the two Quigley schools[6] and one unit of the five

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on the records before us, and apparently is not disputed, that the Quigley schools had a higher degree of religious orientation than did the Indiana schools. The intervening union does not deny that to be admitted to the Quigley schools a boy must receive a recommendation from his parish priest stating that the boy has some interest in the priesthood or has the character and ability to give the local pastor reason to think he has the potential for Christian leadership, either as a priest or a layman. This is a change from former years as prior to 1970 only boys who had a positive desire to be priests were admitted to the Quigley schools. On the other hand, the Indiana schools are typical of so-called parochial high schools found throughout this country maintained and operated by the Roman Catholic Church. Because of the result we reach in these cases with regard to the Indiana schools, we do not deem it necessary to give significance to the apparently greater religiosity of the Quigley schools.

[6] The brief for the Chicago employer complains of mystification that the Board found 46 laymen and a mere $65,500 in interstate purchases as posing a threat to interstate commerce of the type that the National Labor Relations Act was intend-

Indiana diocesan high schools. The unions won the elections and were certified by the Board as the exclusive representatives of the lay faculties in the units.

Following the unions' requests to bargain collectively, the employers refused to bargain in order to obtain judicial review of the Board's representation decisions. The unions then filed unfair labor practice charges with the Board, and complaints issued charging the employers with refusing to bargain with the unions in violation of Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 158(a)(5) and (1). Motions for summary judgment in both cases were filed with the Board. In response, both employers admitted that they continued to refuse to bargain collectively with the lay teachers and raised again the affirmative defense that the Board had no jurisdiction over the seminary high schools and the five diocesan high schools.

The Board granted the motions for summary judgment and held that the employers had violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 158

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ed to meet. It was also pointed out by this employer that it was necessary for the operating budgets for the two Quigley schools to be totalled together as the Board did to meet the Board's jurisdictional standard for private educational institutions as contained in 29 C.F.R., Part 103, Subpart A, § 103.1 (1970), of $1,000,000. We note, however, that the Act authorizes the Board to decide in each case the appropriate unit and whether that should be the employer unit or some other type, 29 U.S.C. § 159(b). Here the Board was within its statutory authority of selecting an employer unit. The Chicago employer's brief has not pursued the matter and we shall likewise refrain from further pursuit.

(a)(5) and (1), by refusing to bargain with the certified bargaining representatives of their employees. In reaching these decisions, the Board rejected the employers' constitutional contentions on the basis that

> (1) the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; (2) the provisions of the Act do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion on religious conduct and is necessary to obtain that objective.

The Board's orders require the employers to desist from the unfair labor practices found and from interfering with their employees' rights under Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Board's orders require the employers to bargain with the unions upon request and to post appropriate notices.

The Board's Decisions and Orders issued on June 18, 1976, and are reported at 224 NLRB No. 164 (1976); and at 224 NLRB No. 165 (1976). The respective church employers have petitioned this court to review and set aside the orders and the Board has cross-applied for enforcement of its orders. This court has jurisdiction in the proceedings under Sections 10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 160(e) and (f).

On the day that oral argument was heard in the present cases, argument was also heard with regard

to the attempted exercise of jurisdiction by the Board over parochial schools in another diocese in Indiana. In that case the bishop had not gone through the Board procedures as in the present cases. The district court in the third case had granted an injunction as to the continuance of the Board proceedings and as to an unfair labor practice charge arising out of a discharge during the representation effort. This court acting through the same panel as in the present cases, in an opinion written by Judge Cummings, unanimously agreed that the district court had no jurisdiction because the status quo in the case did not impede the free exercise of religious belief inasmuch as if the union should win the election and be certified by the Board, the bishop-plaintiff could refuse to bargain with the union and test the validity of the Board's jurisdiction in this court. "Any First Amendment challenge may later be presented in this Court." *Grutka* v. *Barbour*, 549 F.2d 5, 10 (7th Cir. 1977), *cert. denied*, —— U.S. ——, 45 U.S.L.W. 3718 (May 3, 1977). *But cf. Caulfield* v. *Hirsch*, 46 U.S.L.W. 2025 (E.D.Pa. July 7, 1977).

The Board, now that the administrative procedures which were not followed in *Grutka* have been followed here, takes the position primarily that there is no First Amendment infringement in the Board's exercise of jurisdiction but secondarily that, even if there conceivably could be a problem "down the line," any such problem would have to be litigated later and "the Board would be compelled to try to make some

reasonable accommodation to the religious purposes of the school."

To put the present cases into perspective, we will survey briefly the developments which have resulted in the present purported exercise of jurisdiction by the Board. The irreptitious process of bringing private educational institutions within the ambit of the National Labor Relations Act commenced in 1970. In *Cornell University*, 183 NLRB 329 (1970), the Board, ending a long time refusal to assert jurisdiction over non-profit educational institutions as a class, stated that it would no longer decline to assert such jurisdiction. This history was reviewed with regard to another non-profit institution of higher education by the First Circuit in *NLRB* v. *Wentworth Institute*, 515 F.2d 550 (1st Cir. 1975). That court rejected the argument that such educational institutions must be impliedly excluded either because of the Act's legislative history or the Board's earlier policy and held instead that the Act, clear on its face, could not be understood to preclude jurisdiction. We accept *Wentworth* as established law in this respect.[7]

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[7] It would seem beyond any reasonable likelihood that the founding fathers in granting in Article I, Section 8 of the Constitution the power to Congress to regulate commerce among the several states could have had in mind that any Act of Congress controlling the relations between teachers and the proprietors of a private local secondary school would be justified under the commerce power provision. One calls to mind the attitude in a somewhat analogous situation found in *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 517 (1819), and Daniel Webster's oral argument referring to the small college "and yet there are those who love it," in which argument he also said in a passage which the founding fathers might have deemed applicable to the cases before us:

> The case before the court is not of ordinary importance, nor of every-day occurrence. It affects not this college only, but every college, and all the literary institutions of the country. They have flourished, hitherto, and have become in a high degree respectable and useful to the community. They have all a common principle of existence, the inviolability of their charters. It will be a dangerous, a most dangerous, experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuation of political opinions. If the franchise may be, at any time, taken away or impaired, the property also may be taken away, or its use perverted.

Id. at 598-99.

Nevertheless, and being not unmindful that recognition of the scope of the commerce power clause has long since passed the comprehension of the founding fathers, we accept the applicability of the clause to private schools, provided, of course, that its exercise does not run afoul of the First Amendment constitutional protection. *See generally Wisconsin* v. *Yoder*, 406 U.S. 205, 213-15 (1972).

Nevertheless, the Board declined to extend this phase of its recently enlarged jurisdiction to schools found to be "completely religious" and hence declined jurisdiction, where the schools were devoted exclusively to teaching religion or religious subjects. *See, e.g., Association of Hebrew Teachers of Metropolitan Detroit*, 210 NLRB 1053, 1058 (1974); *Board of Jewish Education of Greater Washington, D.C.*, 210 NLRB 1037 (1974). In the following year, however, the Board refined its standard of jurisdiction and accepted jurisdiction where the instruction was not limited to religious subjects and religiously associated schools sought to provide a general education, albeit

an education based on religious principles. *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools, supra.*

The Board's position with regard to schools at least of the type of those found in the diocese of Fort Wayne-South Bend is set forth in its 1976 *Los Angeles* case, *supra*, 223 NLRB at 1218, as follows:

> We also do not agree that the schools are religious institutions intimately involved with the Catholic Church. It has heretofore been the Board's policy to decline jurisdiction over institutions only when they are completely religious, not just religiously associated. *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools,* 216 NLRB 249 (1975). The schools perform in part the secular function of educating children, and in part concern themselves with religious instruction. Therefore, we will not decline to assert jurisdiction over these schools on such a basis. *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools, supra.*

The procedural route followed in the two cases before us varied somewhat, but the result reached was identical in that the constitutional claims were rejected. In case No. 76-1600, the representation petition had originally been dismissed without a hearing by the Acting Regional Director on the basis of *Board of Jewish Education.* The petitioning union filed an administrative appeal, and the Board reinstated the petition and directed the Regional Director to proceed with a hearing. After the hearing, by direction of the Regional Director the proceeding was transferred

to the Board for decision. In response to the employer's contention that the schools involved were minor seminary schools operated independently of each other and beyond the Board's purview and that assertion of jurisdiction would constitute an impermissible entanglement between State and Church, the Board citing *Baltimore* stated that its policy was to decline jurisdiction over religiously sponsored organizations only when they are completely religious, not just religiously associated. The Board concluded by finding no merit in the contentions that the two schools involved were minor seminary schools and therefore "completely religious." In analyzing the record produced at the hearing the Board noted that the Archbishop's policy reflected the desires of the Church to admit those who might adopt the vocation of the priesthood but that in reality the two Quigley schools operated primarily as college preparatory schools "within the class over which the Board has heretofore asserted jurisdiction." Noting that of the 1974 graduating classes only 16% went to the diocesan seminary college, that the academic curriculum was similar to that of other high schools, both private and public, and that the schools maintained a substantial number of extracurricular activities including interschool sports and intramural activities similar to those engaged in by students in other high schools, the Board stated that under these circumstances the Quigley schools, while religiously associated, "are not completely religious," and are the type over which the Board asserted jurisdiction.

When the unfair labor practice case later came before the Board, summary judgment was granted essentially on the basis that nothing was presented which would require the Board to reexamine the decision made in the representation proceeding. In answer to the employer's contention that summary judgment was inappropriate because the Board had never fully determined or addressed itself to the constitutional issues raised in the representation case, the Board responded that the constitutional contentions were clearly raised in the employer's extensive brief to the Board and that the Board's decision in ordering an election had made specific reference to the Church-State entanglement contention in finding "that the Quigley schools, while religiously associated, are not completely religious and of the type over which the Board has asserted jurisdiction." Further, the Board stated that it could not agree with the constitutional contention because of the principles set forth more fully in the *Los Angeles* case, *i.e.*, that the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations, that the provisions of the Act do not interfere with religious beliefs, and that the regulation of labor relations does not violate the First Amendment "when it involves a minimal intrusion of religious conduct" and is necessary to obtain the objective of the Act.

In Case No. 76-1638, the original decision and direction of election was issued by the Acting Regional Director at Indianapolis, Indiana, and summarily disposed of the constitutional claim as follows: "The

Employer's contentions that jurisdiction should not be asserted because of its religious character are rejected. *Archdiocese of Baltimore*, 216 NLRB No. 54." The Board's response thereafter was equally summary, as appears from the following teletype: "EMPLOYER REQUEST FOR REVIEW OF ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION IS HEREBY DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. REQUEST FOR ORAL ARGUMENT IS ALSO DENIED."

When the unfair labor practice case came before the Board, the Board's order handed down the same day as the order in Case No. 76-1600 essentially followed the same pattern as previously discussed herein with regard to the Chicago case. Again reliance was placed on the tripartite statement of the principles of the *Los Angeles* case including the involvement of a minimal intrusion of religious conduct. There is, however, in the Board's order no express finding that the Fort Wayne-South Bend schools were not "completely religious." By virtue of the Acting Regional Director's reliance on *Baltimore* and the Board citation of *Los Angeles*, we may assume, however, that impliedly the Board found the diocesan high schools not to be "completely religious" and that the Board had not abandoned this standard.

The Board contends that it did not abuse its discretion in finding that under its standard the two Chicago minor seminaries and the five Indiana diocesan high schools were not "completely religious." It ob-

serves that the employers do not appear to be questioning its declination of jurisdiction over "completely religious" schools but seem to contend that the Board misapplied the self-imposed jurisdictional standard. Thus, apart from its contention that there is no First Amendment bar to the application of the Act to Catholic schools, the Board argues that the record amply supports its findings. At the same time, however, the Board argues that this court should not review the Board's formulation of its jurisdictional standard in the absence of extraordinary circumstances such as unjust discrimination, citing, *inter alia*, *NLRB* v. *Carroll-Naslund Disposal, Inc.*, 359 F.2d 779, 780 (9th Cir. 1966) ("The question is whether the Board has violated its own self-imposed jurisdictional standards. It is well settled that the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion . . . and is not a question for the courts . . . in the absence of extraordinary circumstances, such as unjust discrimination. . . .")

Because the core question before us is whether the Board's exercise of jurisdiction over the schools constitutes an improper breaching of the separation wall provided by the Religion Clauses of the First Amendment, we regard this issue, being as it is one which has caused frequent discussions in the Supreme Court in other contexts, as sufficiently extraordinary [8] to re-

[8] Adjudication of the constitutionality of Congressional enactments has generally been thought beyond the jurisdiction of administrative agencies. *Grutka, supra* at 8. There is

quire us to analyze the Board's jurisdictional standard by examining it in the light of the cases dealing with the Religion Clauses.

We find the standard itself to be a simplistic black or white, purported rule containing no borderline demarcation of where "completely religious" takes over or, on the other hand, ceases. In our opinion the dichotomous "completely religious—merely religiously associated" standard provides no workable guide to the exercise of discretion. The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition. *See, e.g., Yoder, supra,* 406 U.S. 205. At some point, factual inquiry by courts or agencies into such matters would almost necessarily raise First Amendment problems. If history demonstrates, as it does, that Roman Catholics founded an alternative school system for essentially religious reasons and continued to maintain them as an "integral part of the religious mission of the Catholic Church," *Lemon, supra* at 616, courts and agencies would be hard pressed to take official or judicial notice that these purposes were undermined or eviscerated by the determination to offer such secular subjects as mathematics, physics, chemistry, and English literature.

in the present cases no facial challenge to the statute under which the Board is proceeding but rather one to the application of the statute to certain parochial schools. The manner of application as we pointed out in *Grutka* required the development of a factual record, which has now been done.

In our view the Board decisions dealing with the present question demonstrate that the Board has essentially adopted a per se rule[9] that Catholic secondary schools will be subject to its statutory judisdiction. The simple truth is that the Board had defined those Catholic schools which offer the regular range of secondary subjects as being intrinsically incapable of meeting its jurisdictional standard of "completely religious."

Thus, in *Baltimore*, the Board noted the Archdiocese's contention that the Board should not assert its jurisdiction because of its religious character. Because the Archdiocese "concede[d] that instruction is not limited to religious subjects," the Board rejected the contention. Similarly, in *Los Angeles*, the Board could not agree "that the schools are religious institutions intimately involved with the Catholic Church," even though its decision formally recited that the twenty-six schools were owned and operated by the Archdiocese of Los Angeles. The rationale for rejecting the Cardinal's contention was that

> [t]he schools perform in part the secular function of educating children, and in part concern

[9] The Board has apparently chosen, as it customarily does, to approach the issue of the jurisdictional standard for parochial secondary schools through case-by-case decision-making rather than by the use of its formal rule-making powers under Section 6 of the Act, 29 U.S.C. § 156. For a critique of this phase of the Board's procedures in another education field, see Kahn, *The NLRB and Higher Education: The Failure of Policy Making through Adjudication*, 21 U.S.L.A. L. REV. 63, 167 et seq. (1973).

> themselves with religious instruction. Therefore, we will not decline to assert jurisdiction over these schools on such a basis.

223 NLRB at 1218.

Under the rationale the Board has adopted, it is readily apparent that secondary schools operated by various dioceses of the Roman Catholic Church can never be characterized as "completely religious." Once the employer admits the fact that its schools are performing "in part the secular function of educating children," it becomes definitionally impossible under the Board's cases to establish that the institutions can be anything else but "merely religiously associated."

The vagaries of litigation seldom present a "no lose" situation. Yet the Board's formulation of the "misapplication of jurisdictional standards" argument does seem to present a quintessential example of one. Assuming that the amount of gross revenues suffices, institutions which the Supreme Court has generically labeled as "sectarian," "substantially religious," "pervasively sectarian," "church-affiliated," and "religious-pervasive institutions," *e.g.*, *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 748-54 (1976); *Meek* v. *Pittenger*, 421 U.S. 349, 366 (1975); *Levitt* v. *Committee for Public Education*, 413 U.S. 472 (1973); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 767-68 (1973); *Lemon* v. *Kurtzman*, *supra*, are definitionally transmuted in-

to schools which are "merely religiously associated." [10] The total inability of the employers to overcome what appears to be an irrebuttable presumption in practical operation makes more understandable the complaint of the employers that the Board is cruelly whip-sawing their schools by holding that institutions too religious to receive governmental assistance are not religious enough to be excluded from its regulation.

Following the premise in the recent *Wolman* case, *id.* at 4962-63, that irrespective of the height, breadth, straightness, or fissures in the Religion Clauses separation wall, the Court's numerous precedents in this area are firmly rooted and now provide substantial guidance, we turn to the teaching to be derived from those cases.

As an initial matter, while the so-called parochaid cases are concerned primarily with whether the flow of benefits from governmental sources to the church schools should be prohibited, an equally basic purpose of the Religion Clauses is also to see that no religion is inhibited. "[W]e will not tolerate either governmentally established religion or governmental interference with religion." *Walz* v. *Tax Commission*

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[10] The most recent case in the present area is that of *Wolman* v. *Walter*, —— U.S. ——, 45 U.S.L.W. 4861 (June 24, 1977), a case which some observers have interpreted as retreating somewhat from a staunch insistence on the separation of Church and State. We observe nevertheless that the decision refers with regard to instructional materials and equipment to "the impossibility of separating the secular educational function from the sectarian . . . ." *Id.* at 4866.

of the City of New York, 397 U.S. 664, 669 (1970). As a result of the tension inevitably existing between the Free Exercise and the Establishment Clauses, "our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." (Footnote omitted.) *Nyquist*, *supra* at 788.

We find particularly significant this statement in *Walz*, *supra* at 669:

> Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or *interfere with religious beliefs and practices or have the effect of doing so.* Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice. [Emphasis added.]

We find no basis in the present record for thinking that the Board has made any value judgments under the Religion Clauses as to whether their exercise of jurisdiction will have the *effect of* interfering with religious beliefs or practices. That the Board did not do so is no doubt a conscious consequence of the Board's realization that measuring the degree of religiosity in any particular institution would perforce involve it in answering the sensitive question as to how far religion pervades that institution. Avoiding the question, however, does not and cannot negative its continued existence, nor can a wooden adherence to a jurisdictional standard of "merely religiously as-

sociated" mean that simply because a school includes in its curriculum secular subjects it is thereby deprived of the protection of the Religion Clauses in its recognized pursuit of the propagation of its religious faith.[11]

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[11] While the Board purported to avoid an excursion into religiosity by the use of its simplistic test, the record in one of the cases reflects several cases of attention to strictly religious matters. There were several questions by counsel for the union on these subjects, and the following occurred in colloquy between the hearing officer and one of the employer's witnesses:

Q Now, we have had quite a bit of testimony already as to liturgies, and I don't want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?

A I think our first problem with that would be defining liturgies. That word would have many definitions. Do you want to go into that?

Q I believe you defined it before, is that correct, when you first testified?

A I am not sure. Let me try briefly to do it again, okay?

Q Yes.

A A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman Catholic terminology. It can go from that all the way down to a very informal group in what we call shared prayer.

Two or three individuals praying together and reflecting their own reactions to a scriptural reading. All of these—and there is a big spectrum in between those two extremes—all of these are popularly referred to as liturgies.

Q I see.

A Now, possibly in repeating your question, you could give me an idea of that spectrum, I could respond more accurately.

Indeed, with regard to the matter of neutrality or noninterference, the position of the Court is a more positive one than mere neutrality but is a positive "hands off" stricture with respect to "the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian Eastern Orthodox Diocese for the United States of America and Canada* v. *Milivojevich*, 426 U.S. 696, 713 (1976); *Presbyterian Church* v. *Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Gonzalez* v. *Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Kreshik* v. *St. Nicholas Cathedral of the Russian Orthodox Church of North America*, 363 U.S. 190 (1960).

We have earlier herein collectively referred to some of the recent Supreme Court cases involving challenged state aid to parochial schools and pointed out in that connection that these institutions had been generically labeled in a manner which appeared to be inconsistent with a constitutional basis for differentiating between "completely religious" and "religiously associated." For further elaboration on that particular aspect of the present cases, we turn to language contained in two cases:

> On the basis of these findings the District Court concluded that the parochial schools constituted "an integral part of the religious mis-

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Q Well, let us stick with the formal Masses. If you know how many Masses are required at Catholic parochial high schools?

sion of the Catholic Church." The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education. [Footnote omitted.]

Lemon, *supra* at 616.

> Several teachers testified, however, that they did not inject religion into their secular classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential if not actual hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay

> teachers are of the Catholic faith. Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation.
>
> We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authority over the meaning of the statutory restrictions.

Id. at 618-19.

Mr. Justice Douglas in his concurring opinion in *Lemon* graphically demonstrated the thorough religious permeation of the entire curriculum of parochial schools in the following language:

> Elimination of prayers is only part of the problem. The curriculum presents subtle and difficult problems. The constitutional mandate can in part be carried out by censoring the curricula.

What is palpably a sectarian course can be marked for deletion. But the problem only starts there. Sectarian instruction, in which of course, a State may not indulge, can take place in a course on Shakespeare or in one on mathematics. No matter what the curriculum offers, the question is, what is *taught*? We deal not with evil teachers, but with zealous ones who may use any opportunity to indoctrinate a class.[20]

It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind. Rev. Joseph H. Fichter, S.J., stated in Parochial School: A Sociological Study 86 (1958):

> "It is a commonplace observation that in the parochial school religion permeates the whole curriculum, and is not confined to a single half-hour period of the day. Even arithmetic can be used as an instrument of pious thoughts, as in the case of the teacher who gave this problem to her class: 'If it takes forty thousand priests and a hundred and forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?' " [12]

Id. at 634-35.

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[12] Mr. Justice Douglas' supporting footnote 20 read as follows:

> " 'In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools; the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.' L. Boettner, Roman Catholicism 360 (1962)."

The Court restated its conclusions regarding the religious character of parochial schools in *Meek* v. *Pittenger*, *supra* at 365:

> [I]t would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools. . . .

The Court, quoting from *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973), referred to the schools as institutions "in which religion is so pervasive that a substantial portion of . . . [their] functions are subsumed in the religious mission . . . ." *Id.* at 366.

The Court then explained:

> The church-related elementary and secondary schools . . . typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon* v. *Kurtzman*, 403 U.S., at 616-17 . . . "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the

> schools' existence. Within the institution, the two are inextricably intertwined."

Id. at 366.

The parochial schools in the cases before us are indistinguishable from those described in *Lemon* and *Meek* other than that the Quigley schools are even more completely religiously oriented. All of these essentially patricentric schools are completely subject to the authority of the respective bishops who have the general right of vigilance as to faith and morals and direct authority as regards religious instruction.[13] The bishops operate the schools through functionaries who are completely subservient to the bishops' authority. The purpose of the schools is to carry out the teaching mission of the Catholic Church. The teachers share in the ecclesiastical authority of the Bishop, and all teachers are expected to assist the students to become good Christians. The fact that these institutions provide a secular as well as a religious education does not detract from the fact that the religious mission "is the only reason for the schools' existence." *Meek*, *supra* at 366.

At this point it might appear upon the basis of the principles established in the Supreme Court cases

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[13] The Ordinaries of the places (the residential bishops) have the right and duty to watch that in any schools within the territory nothing is taught and nothing is done which is contrary to faith or good morals. The bishops "have also the right to approve teachers and textbooks of religion; and also to demand in the interest of religion and morality that either teachers or books be removed . . . ." BOUSCAREN AND ELLIS, *supra* at 747.

that enforcement should be denied because the permeation of religion throughout the entire curriculum of the schools is such that the Board finding them to be only religiously associated constituted an abuse of the Board's discretion. The Board, however, also contends that if it cannot exempt from its jurisdiction schools which are "completely religious," or for that matter, schools which are "partly religious" or even "religious in some degree," it would follow that the Board would necessarily have to assert jurisdiction over all religious schools in view of the otherwise inclusive scope of the statute under which it operates. Because of this position, we find it necessary to turn to the larger constitutional question.

We find ourselves, however, in agreement with the employers' contention that the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools. No longer would the bishop be the sole repository of authority as required by church law. Canon 1381. As the Board recognizes, the bishop has now to share "some decision-making" with the union and, as a practical matter, must now consult the lay faculty's representative on all matters bearing upon the employment arrangement. As Professor Brown, Associate Dean of Yale Law School, has observed:

> Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to

> range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur.

Brown, *Collective Bargaining in Higher Education*, 67 MICH. L.REV. 1067, 1075 (1969).

In a law review article several years later quoting the above statement of Professor Brown, it is stated that from the evidence of contracts which have already been negotiated Professor Brown's views appear to be correct. Kahn, *The NLRB and Higher Education, supra* at 80. The later article points out that the National Labor Relations Act which was designed and has been administered according to traditional collective bargaining doctrines is inappropriate for higher education. The faculty's bargaining interests, the article points out, extend beyond the traditional scope of collective bargaining and, at least as to the faculty of a college or university, "the term 'conditions of employment' has a meaning which leaves very little not subject to bargaining." *Id.* at 79. A report quoted in the article points out because faculty members are both professionals and employees their interests span a wide range of substantive issues, the resolution of which will determine the role of the institution and the status and opportunities of the individual faculty members. First among the categories considered to be of legitimate interest are educational and administrative policies. *Id.* at 80. While

the article in question is directed at the college level,[14] we are unaware of any reason that the same approach would not be involved in the secondary schools by the professional lay teachers there employed.

The Board's order to bargain unquestionably, in our opinion, inhibits the bishops' authority to maintain parochial schools in accordance with ecclesiastical concern. If a bishop, for example, should refuse to renew all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of the institutions, or because he wanted to replace lay teachers with religious-order teachers who had become available, under ecclesiastical law he would have the right if not the duty to take that action. Yet, under the National Labor Relations Act, he might well be found guilty of an unfair labor practice. 29 U.S.C. § 158 (a)(1), (3) and (5). *See, e.g., NLRB* v. *Burnup & Sims, Inc.*, 379 U.S. 21 (1964). The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To

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[14] We emphasize, as we did in connection with our discussion of *Wentworth, supra,* that we do not herein question the correctness of the exercise of Board jurisdiction over private, non-sectarian schools. Our inclusion of references to the Brown and Kahn articles is not intended to reflect any change of position on the *Wentworth* premise but is to demonstrate what we regard will be the inevitable tenor and direction of negotiations on conditions of employment between professional faculty members and school administrators at all educational levels.

minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to "steer far wider of the unlawful zone" of impermissible conduct. *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). If, for example, a teacher should give a strong pro-union speech at a meeting one week and the next week would advocate the cause of birth control to his or her students or favor the availability to poor people of abortion, the bishop would be confronted with a choice of foregoing his right to discharge the heretical employee or do so at the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs.

In sum, it is unrealistic to say that an employer which has to honor a bargaining order is not substantially inhibited in the manner in which it conducts its operations. This is true of all bargaining orders but on the general industrial and commercial scene sound policy considerations have upheld this imposition, inhibiting though it may be, which policy declarations are found at 29 U.S.C. §§ 141 and 151. We do not disagree with the soundness of the legislative policy determinations which have been consistently upheld by the courts. We only say that when that imposition conflicts with the Religion Clauses that the First Amendment protective wall should prevail. *See Sherbert* v. *Verner*, 374 U.S. 398, 406-09 (1963).

We, of course, must recognize that there are permissible governmental impingements upon the operation of the church schools. Chief Justice Burger in *Lemon*, *supra* at 614, pointed out that the prior holdings of the Court do not call for total separation between Church and State; total separation not being possible in an absolute sense. The opinion then indicated that some relationship between government and religious organizations was inevitable such as fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws. These were listed as examples of necessary and permissible contacts. To the extent that it is argued that the present Board action is similar to these necessarily permissible contacts, we do not agree. Laws on matters such as fire inspections and compulsory attendance do not have the clear inhibiting potential upon the relationship between teachers and employers with which the present Board order is directly concerned.

Further, the type of governmental restrictions found in laws pertaining to zoning, school-attendance, and similar subjects involve a distinction which has been recognized in the parochaid cases as significant with regard to the matter of aid and conversely it would seem should be significantly applicable to the inhibiting side of the coin. Thus, in *Nyquist*, *supra* at 782 n. 38, the Court stated the following: "*Allen* [*i.e.*, *Board of Education* v. *Allen*, 392 U.S. 236 (1968)] and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those

in public as well as those in private schools. See also *Tilton* v. *Richardson, supra,* [403 U.S. 672 (1971)] in which federal aid was made available to *all* institutions of higher learning, and *Walz* v. *Tax Comm'n, supra,* in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions." (Emphasis in original.) The inhibiting restrictions resulting from the Board's determination that it will exercise jurisdiction over parochial secondary schools is not applicable to the great bulk of the secondary schools in this country being, of course, public schools which are operated by political subdivisions of states which are expressly exempted from the definition of "employer." 29 U.S.C. § 152(2).

The Board concedes that "disputes in parochial schools may well involve issues of religious doctrine," but asserts that its only concern in deciding disputes would be focused on the commission of unfair labor practices which are inherently unrelated to differences of religious interpretation. The Board further contends that even if it were to intrude into doctrinal matters, inadvertently or otherwise, the remedy would be, not to strip it of its general jurisdiction to adjudicate underlying unfair practice disputes, but simply to require it to decide its case without regard to the merits of the alleged doctrinal issues. We have difficulty in following the Board's rhetoric. We are unable to see how the Board can avoid becoming entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor

with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but contrary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of this examination would necessarily include the validity as a part of church doctrine of the reason given for the discharge.

That these paradigmatic situations proposed above are not merely fanciful horror tales devised by an employer who seeks to avoid labor board jurisdiction is rather persuasively demonstrated by charges that have actually been filed as demonstrated by one employer's brief.

The summary in one of the briefs is as follows:

> Three unfair labor practices charges have been filed with respect to the very schools involved in this case. In Case No. 25-CA-7932-3 filed May 7, 1976 with NLRB Region 25, Indianapolis, Indiana, for example, the Union charged that the Diocese committed an unfair labor practice when it refused to offer a teacher a contract. The Diocese responded that the teacher's contract was not renewed because *inter alia* she exposed biology students to sexual theories of Masters and Johnson that were contrary to the teachings of the Catholic Church. In Case No. 25-CA-7932, filed May 4, 1976, with

NLRB Region 25, Indianapolis, Indiana, to cite another example, a similar charge was filed because the Diocese refused to renew a teaching contract. The Diocese responded that the teacher's contract was not renewed because the teacher married a divorced Catholic and was no longer in good standing with the Church. The third case, Case No. 25-CA-7932-2, was filed May 7, 1976, with NLRB Region 25, Indianapolis, Indiana. The Diocese refused to renew a teaching contract because the teacher was unwilling to structure a course in religion as directed by the principal and chairman of the religion department. Whether these actions constitute firing for cause is for the Board to decide. *Compare* 29 U.S.C. § 160(c). To make such decisions, however, the Board inevitably must assay the moral teachings of the Church there at issue and delve into two thousand years of religious tradition.[15]

The same brief also refers to an unfair labor practice charge by a teacher at the parochial high school in the diocese of Gary, Indiana, which charge was a part of the subject of the action involved in *Grutka, supra*. The charge there was that the recitation of a prayer by the Catholic bishop of the diocese interfered with employees' rights and the Board's complaint as filed according to the employers' briefs read in part as follows:

> "On or about the dates set forth below in 1976, and at the place set forth below, the Respondent,

[15] The sixth and seventh sentences of this extract appeared in a footnote in the employer's brief. They have been relocated in the quoted extract for purposes of clarity.

> by and through its supervisors and agents named, did:
>
> (a) Make implied promises of benefit and threats of reprisal to induce employees to cease their union activities and to cease their affiliation with the American Federation of Teachers by reciting to said employees a prayer entitled 'Repent Ye Sinful Children;' and in reading aloud to said employees the General Epistle of Saint James, Chapter 4, Verses 1-10—Father Casimer Senarik and Father Sierkierski—February 26 at the residence of Bishop Andrew G. Grutka."

We are advised that subsequent to the filing of the employers' original briefs this particular charge was dismissed by an Administrative Law Judge. It is of interest to note, however, that the charge was dismissed only after three days of testimony and 531 pages of transcript. We agree with the employers that such a dismissal does very little to establish the Board's sensitivity to the principles of the Religion Clauses.

The Board also argues what appears to be a "case or controversy" contention by arguing that the asserted constitutional injury cannot be merely speculative but must be demonstrable reality or as the matter was phrased during oral argument, there conceivably could be a problem "down the line" which would have to be litigated at some subsequent time but that there is no present problem. As we have already indicated, we do not regard the exposure which the certification forces upon the two bishops to

be speculative or fanciful. The whole tenor of the Religion Clauses cases involving state aid to schools is that there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities only but it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists. Thus, we find the language in *Lemon*, *supra* at 619, concerning a difficulty in "the *possibility* of disagreement between teacher and religious authorities over the meaning of the statutory restrictions." (Emphasis added.) Also in the same case we find, at 620, the language: "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship *pregnant with dangers of excessive government direction* of church schools and hence of churches." . . . "[W]e cannot ignore here the danger that pervasive modern governmental power will *ultimately* intrude on religion and thus conflict with the Religion Clauses." (Emphasis added.)

Likewise, the Court in *Walz*, *supra* at 674, had no difficulty in forecasting the reasonably-to-be-expected result from the elimination of the real estate tax exemption for church property as including tax foreclosures:

> Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.

To anticipate that tax foreclosures would follow in the train of the legal processes would require that the no longer exempt church would be unable or unwilling to pay its real estate tax and would be confronted with a tax foreclosure suit. The certitude of entanglement with doctrinal matters in our opinion is much greater than in the present case than the possibilities involved in *Walz*.

Both the union and the Board rely heavily upon the early case of *Associated Press* v. *NLRB*, 301 U.S. 103 (1937), and argue that the question before this court is no different in principle than the question before the Court in the earlier case. We find the reliance misplaced. We do not read *Associated Press* as really having anything to do with freedom of the press under the First Amendment. The case that came before the Court in *Associated Press* did not and we do not see how it could have involved freedom of the press. Very simply the case that came before the Court involved an employee who was discharged for his activities in connection with the Newspaper Guild. *Id.* at 125. In its answer before the Board the employer had denied that the discharge was due to Guild activities. Apparently there had been a contention before the Board that the discharge was solely on the grounds of the work not being on a basis of which he had shown capability. This contention was not pursued in the Supreme

Court which, as stated above, had an unchallenged situation before it of discharge for union activity.

It is true that the Court purported to address First Amendment freedom of speech and freedom of press questions but held that the statute as applied to the petitioner did not abridge these freedoms. The Court made it clear that the application of the Act to the Associated Press did not in any way interfere with its freedom not to employ or not to retain an incompetent editor or one who failed to edit the news to reflect the facts without bias or prejudice. This involved simply a matter common to all employers of not hiring or retaining an employee who would not or does not carry out directions or instructions or subverts those directions. Failure of a newspaper employee to carry out a publisher-employer's policy would not bear on freedom of the press; a failure of a lay teacher to carry out a bishop-employer's policy would directly interfere with the exercise of religion.

Reasons for discharge other than for union activity prohibited by the Act in the case of the news media would as we see it have nothing to do with freedom of the press, whereas in the cases before us as we have indicated hereinbefore doctrinal reasons or violation of doctrinal or church principles would directly concern the Religion Clauses of the First Amendment. In sum, the right of the Associated Press either to discharge or not to hire an employee because of incompetency or for any other reason other than those protected by the Act would not in our opinion be dependent upon or in any way related to its right of

press freedom, a freedom belonging to it by virtue of the Constitution. That, as has been said, is not true of the situation involved in the cases here under consideration.

We are not unmindful that the four dissenting justices rested their disagreement upon their fears that the majority opinion constituted an infringement upon the freedom of the press. The rationale of the dissent, however, was that "freedom of the press" obviously meant more than publication and circulation but included the right to adopt or pursue a policy without governmental restriction. *Id.* at 137. The dissenters accepted as true the statement of the reason for the discharge but stated that they were "of opinion that the constitutional immunity of the press does not permit any legislative restriction of the authority of a publisher, acting upon his own judgment, to discharge anyone engaged in the editorial service," terming such a restriction in itself to be an abridgement of the freedom of the press. *Id.* at 137-38.

In *Associated Press*, as the majority points out, even the ostensible claim before the Board was that the discharge was on a matter of capability and there was no claim before the Board nor a claim before the Court that the employee would show bias in his future reporting or editorial work. This was too much a non-existent and an assumed circumstance without any basis in fact for the Court to address the matter. On the other hand, in the situation in which we are involved, we have attempted to demonstrate

that the necessity of bargaining and negotiating with faculty members on conditions of employment inevitably involves conflicts concerning the religious program of the schools and infringement of the First Amendment Religion Clauses. Inevitably some of a lay teacher's responsibilities must hover on the imprecise border between religious and secular orientation.

During oral argument, counsel for the Board was asked what the situation would be if a bishop should attempt to discharge a teacher-heretic and unfair labor practice charges were filed. The Board's counsel expressed the opinion that the Board would be required in that situation to take cognizance of the religious nature of the grounds for discharge and give respect to that. He repeated that the First Amendment would require, in his opinion, the Board to take cognizance of this special kind of reason. He further supplemented the observation by expressing the opinion that the Board would be compelled "to try to make some reasonable accommodation to the religious purpose of the school." He thought that the First Amendment demanded at least that, and it was his understanding that the Board would not order reinstatement of a heretic in the classroom. He expressed the opinion that such reinstatement would be well beyond the power of the Board. He further differentiated accommodation from entanglement.

Even if we were to assume that the Board in handling parochial school teacher cases would consider itself bound by the statements of its counsel in an

oral argument before this court, as to which we must confess extreme skepticism, we have difficulty in finding avoidance of entanglement by the employing bishop in governmental toils in his future conducting of the religious programs of the schools under his aegis.

We direct our attention to just what "accommodation" might mean. We can without citing authority recognize the word "accommodation" as having long definitional experience in the law pertaining to bills and notes or the law merchant. That development of law is little use to us here. More recently the term is periodically found in other areas. Thus, in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Co.*, 353 U.S. 30, 40 (1957), Chief Justice Warren wrote that there had to be accommodation of the Norris-LaGuardia Act with the Railway Labor Act so that the obvious purpose in the enactment of each was preserved. Significantly, however, in speaking for the Court, he stated that the purposes of the two Acts were reconcilable.[16] Still more recently an area of litigation has developed under Title VII of the Civil Rights Act of 1964, coincidentally implicating Religion Clauses questions. A specific case in this respect is *Cummins* v. *Parker Seal Company*, 516 F.2d 544 (6th

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[16] We are not, of course, in the present cases concerned with reconciling the purpose of two equal strength statutes. Reconciliation in the statutory situation could reasonably contemplate adjustments. While a statute may be adjusted so as not to offend a constitutional right, we would deem that the reverse route of adjusting the constitutional right so as not to offend the statute, or its application, is one which is not susceptible of pursuit.

Cir. 1975). That case involved an EEOC regulation, 29 C.F.R. § 1605.1 (1974). This regulation was to the effect that the duty of an employer not to discriminate on religious grounds as required by the Civil Rights Act included an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations could be made without undue hardship on the conduct of the employer's business. *Id.* at 546. The majority of the Sixth Circuit panel held that the religious accommodation rule did not violate the First Amendment with Judge Celebrezze dissenting on constitutional grounds. In *Yott* v. *North American Rockwell Corporation*, 428 F. Supp. 763 (C.D. Cal. 1977), the district court found itself unpersuaded by the majority in *Cummins* and held that the religion provisions of the Civil Rights Act of 1964 violated the Establishment Clause of the First Amendment of the United States Constitution. A similar question was involved in *Trans World Airlines, Inc.* v. *Hardison*, —— U.S. ——, 45 U.S.L.W. 4762 (June 16, 1977). However, the constitutional issue was not reached because of the Court's disposition of the case, which was that the employer had not violated the Act or the Regulation inasmuch as its conduct constituted reasonable accommodation under the circumstances and in the light of the "undue hardship" standard. Although *Cummins* was affirmed by an equally divided Court, 429 U.S. 65 (1976), the Court subsequently granted rehearing and vacated its own judgment and that of the court of appeals and remanded for further

consideration in the light of the *Trans World Airlines* case. —— U.S. ——, 45 U.S.L.W. 3839 (June 27, 1977).

This synopsis of recent litigation in the religion area persuades us that at the very least there is a substantial constitutional question presented where what is involved is an "accommodation" or, synonymously, an adjustment or an adaptation or a compromise and settlement involving a First Amendment right. A "reasonable accommodation" by the Board "to the religious purposes of the school" on the presentation of a doctrinal issue in an unfair labor practice case would implicitly appear to us to involve the necessity of explanation and analysis, and probably verification and justification, of the doctrinal precept involved, all of which would itself erode the protective wall afforded by the constitutional right.

If as the Board counsel indicated during oral argument in the present cases, reasonable accommodation would mean that where the religious question was presented for discharge or failure to hire it would override somehow the fact that the discharge or failure to hire was also motivated by antiunion reasons, then it would seem there would be still other substantial constitutional questions presented. At this point putting aside for the moment the fact that even to reach the stage of convincing the Board of the necessity of an accommodation, the bishop, as we have mentioned previously in this opinion, would have to eliminate the pretextual aspect of claimed justification which would involve the matter of showing the valid-

ity of the claimed doctrinal position advanced. We are not unmindful in that respect that the freedom of exercise of religion includes adhering to beliefs which may not be generally accepted or may indeed be deemed generally unacceptable but never to the point of being proscribed as a religious belief even though subject to prohibition as a practice, for example, belief in polygamy. The matter of the constitutional toleration of diverse religious views was aptly stated by Justice Douglas in *United States* v. *Ballard*, 322 U.S. 78, 87 (1944):

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. *When the triers of fact undertake that task, they enter a forbidden domain.* The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. [Emphasis added.]

Thus, and applicable to the present context, we can judicially note that there is some division on the acceptability of birth control, and certainly wide division on that of abortion. On the latter, at least, the division of opinion is not merely confined to non-Catholics.

The real difficulty, even if accommodation could otherwise properly be brought to play in the present situation, is that it would run afoul of well-established principles applicable to all other employers in the labor relations area. "[O]nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." [Emphasis in original.] *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). "[T]he rule is well established that although ample valid grounds may exist for the discharge of an employee, that discharge will violate § 8(a)(3) if it was in fact motivated, *even partially*, by the employee's union activity." [Emphasis added.] *NLRB* v. *The Pembeck Oil Corporation*, 404 F.2d 105, 109 (2d Cir. 1968), *vacated on other grounds and remanded*, 395 U.S. 828 (1969).

In sum, on this point it appears clear that the existence of a valid ground for discharge is not sufficient, if it was merely a pretext or the discharge was based in part on an unlawful ground. *NLRB* v. *Advanced Business Forms Corporation*, 474 F.2d 457, 464 (2d Cir. 1973). We fail to comprehend the real

possibility of accommodation in the present context without someone's constitutional rights being violated, which in turn would seem to preclude the possibility of accommodation as an answer to the obviation of the religious entanglement problem.

In reaching the conclusion that we have in this opinion that those who undertake to teach young people in parochial schools which have been denied state aid because of their pervasive religious nature are as such teachers denied the important protective rights of the National Labor Relations Act, we cannot be unmindful of the substantial importance of the national policy as stated in that Act of "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. A church which chooses to educate its own young people in schools which it is required essentially to finance without governmental aid should because of the essentially religious permeation of its curriculum be equally freed of the obviously inhibiting effect and impact of the restrictions of the National Labor Relations Act in conducting the teaching program of those schools. We, of course, would assume that a church so choosing would usually not itself be unmindful of the desirability of affording its young people an education which would suitably equip them mentally for participation in daily life and that this obvious desire

will require the securing and retention of teachers of competence, many of whom in this day and age will not be altogether motivated in seeking employment by the love of the institution which they are seeking.

Having indicated our holding on these cases, we add comments on two matters.

The first matter is an economic one. In our research we had occasion frequently to note references of one sort or another to the fact that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience, that these schools are confronted with increasingly grave fiscal problems the resolution of which by increasing tuition charges forces parents to turn to the public schools and that this in turn exacerbates the problems of public education at the same time that it weakens support for the parochial schools. *See, e.g., Nyquist, supra* at 795.

We now learn that during the present year the Vatican for the first time has called for government financial support of the world's Roman Catholic schools, warning that in the present situation these schools could be more and more frequently available only to the rich without public aid.[17]

While the fact that the abolition of parochial schools would undoubtedly throw a tremendous financial burden upon taxpayers whose already heavy school tax costs are reduced by the substantial numbers of students in parochial schools, nevertheless the eco-

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[17] Chicago Sun-Times, July 6, 1977, at 4.

nomic factor has not been a persuasive one, and, in fact, has not been given a decisional aspect in the parochaid cases. Indeed, in *Nyquist*, *supra* at 795-96, the Court pointed out that the economic factor if anything militates against state aid and that increasing state aid could lead to divisiveness related to religious beliefs and practice and the need for continuing and increasing annual appropriations. We do observe, however, that an evenhanded approach to justice might seem to suggest that the Religion Clauses, serving as they do as a buckler to stop financial aid to these schools should not now be any less effective to ward off the inhibiting effect of the governmental regulation here involved.

Secondly, we have generally in this opinion referred to the Religion Clauses rather than dwelling on the differentiations between the dual aspects of the Religion Clauses of "establishment" and "free exercise" of religion. Our treatment of the Religion Clauses jointly has been because of our belief that there has been some blurring of sharply honed differentiations. Even though "establishment" may at one time have been construed to mean establishing a state religion, it is no longer so but as is pointed out in *Lemon*, *supra* at 612, a key word in the First Amendment is "respecting" and that a law may be one "respecting" a forbidden objective while falling short of its total realization. There are substantial aspects in the present cases, in our opinion, not only of sovereign involvement in the religious activity under the establishment clause but there is undoubtedly, in our view, also cur-

tailment of the free exercise of religion under the second prong of the Religion Clauses. Under these circumstances we have felt it sufficient to leave the matter of disposition jointly on the Religion Clauses, each of which has the identical purpose of maintaining a separation between Church and State.

For the reasons set forth herein, the orders of the National Labor Relations Board in these cases dated June 18, 1976, are hereby set aside and the Board's cross-applications for enforcement of said orders are denied.

SPRECHER, *Circuit Judge*, concurring. In concurring with Judge Pell's persuasive opinion, I would only add that the National Labor Relations Board, in attempting to steer a course between the Scylla and Charybdis of the Establishment and Free Exercise Clauses, has collided with one and fallen into the other. The Board's assertion of jurisdiction will have the effect of inhibiting the practice of religion by regulating it, yet by conceding that this will inexorably force it to "accommodate" and prefer religious employers and conversely to discriminate against secular employers in like situations, it will in the constitutional sense "establish" the religions with which it deals.

A True Copy:
Teste:

/s/ Krystine F. Juleen
Deputy Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX B

OPINION BY JUDGE PELL

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 3, 1977

BEFORE:

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

No. 76-1600

THE CATHOLIC BISHOP OF CHICAGO,
a corporation sole, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,
ILLINOIS EDUCATION ASSOCIATION, INTERVENOR.

No. 76-1638

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.,
PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

On Petitions for Review and Cross-Applications for Enforcement of Orders of the National Labor Relations Board

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This cause came on to be heard on the transcript of the record from the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the orders of the National Labor Relations Board in these cases dated June 18, 1976, are hereby set aside and the Board's cross-applications for enforcement of said orders are denied, in accordance with the opinion of this Court filed this date.

APPENDIX C

The Catholic Bishop of Chicago, A Corporation Sole *and* Illinois Education Association. Case 13-CA-14944

June 18, 1976

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

Upon a charge filed on December 5, 1975, by Illinois Education Association, herein called the Union, and duly served on The Catholic Bishop of Chicago, a Corporation Sole, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint and notice of hearing and an amendment to the complaint on December 19, 1975, and January 6, 1976, respectively, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, notice of hearing before an Administrative Law Judge and amendment to the complaint were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint as amended alleges in substance that on November 3, 1975, following a Board election in Case 13-

RC-13402 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; [1] and that, commencing on or about November 25, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 31, 1975, and January 16, 1976, Respondent filed its answer to the complaint and amendment to answer, admitting in part, and denying in part, the allegations in the complaint.

On January 12, 1976, the Union filed with the Board a response to the answer and affirmative defenses and a motion to transfer the case to the Board and to enter summary judgment. On January 19, 1976, Respondent and the General Counsel filed responses to the Union's motion. On January 26, 1976, the Union filed an amended response.

On February 19, 1976, counsel for the General Counsel filed directly with the Board a Motion for

[1] Official notice is taken of the record in the representation proceeding. Case 13-RC-13402, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

Summary Judgment. Subsequently, on February 26, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the Motions for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause and motion to dismiss the complaint, a memorandum in support, and a motion for oral argument. Counsel for the General Counsel and the Union subsequently filed responses and opposition to Respondent's motions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceding,[2] the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer, amendment to answer, response to the Notice To Show Cause, motion to dismiss complaint, and memorandum in support, Respondent contends, in substance, that it is exempt from Board jurisdiction because (1) it is a not-for-profit religious entity engaged in the operation of minor seminaries; (2) the schools are separately operated and do not meet discretionary jurisdictional standards; (3) Re-

[2] The Respondent's motion for oral argument is hereby denied as the positions of the parties are adequately set forth in their submissions in this and the representation proceedings.

spondent's impact on commerce is slight; and (4) assertion of jurisdiction would violate the first amendment. In addition, the Respondent's answer denies the appropriateness of the unit. In their Motions for Summary Judgment and submissions, counsel for the General Counsel and the Union contend that each of Respondent's jurisdictional arguments was individually considered and determined in the prior representation proceeding and may not be relitigated. We agree.

Review of the record, including the representation proceedings in Case 13-RC-13402, establishes that after a hearing on jurisdiction and unit questions,[3] the Regional Director ordered proceedings transferred to the Board. The Union submitted a brief to the Board, arguing that Respondent's religious association did not exempt it from board jurisdiction and that a single unit of lay teachers, including department chairmen at Respondent's Quigley North and Quigley South Preparatory High Schools, was appropriate. In its brief, Respondent extensively argued that assertion of jurisdiction would violate the first amendment, as interpreted by the United States Supreme Court, in that it would involve impermissible

[3] The Acting Regional Director originally had dismissed the petitions on the grounds that Respondent's activities at the two schools were "intimately connected with the religious activities of that institution." The Union appealed and the Board reinstated the petition on the grounds that the issues could best be resolved by a hearing.

church-state entanglement and would impinge upon free exercise of religion. Respondent further contended, in substance, that the Board should not assert jurisdiction because the separately operated schools did not meet the Board's discretionary jurisdictional standards, and also because they were minor seminaries, primarily religious in character. In addition, Respondent contended that department chairmen were supervisors who should be excluded from the unit.

On September 16, 1975, the Board issued its Decision and Direction of Election, rejecting the Respondent's contentions.[4] With respect to the jurisdictional issues, the Board, referring specifically to Respondent's contention that assertion of jurisdiction would constitute impermissible church-state entanglement, found (1) that the Quigley schools, while religiously associated, were not completely religious and were of the type over which the Board has asserted jurisdiction; (2) that the two schools operated as an integrated enterprise which met the Board's discretionary jurisdictional standards; and (3) that it would effectuate the purposes of the Act to assert jurisdiction. The Board ordered an election in a single unit of all Respondent's lay faculty, including department chairmen. The election, held on October 17, 1975, was won by the Union.

Respondent filed with the Regional Director timely objections reiterating its previously raised jurisdiction

[4] 220 NLRB 359 (1975).

and unit contentions. On November 3, 1975, the Regional Director issued his Supplemental Decision and Certification of Representative, finding that Respondent's objections did not involve conduct of the election and were tantamount to a motion for reconsideration of the Board's decision which need not be considered. Accordingly, he overruled them entirely and certified the Union. No appeal was taken to the Board from the Regional Director's ruling.

In its response to the Notice To Show Cause, Respondent contends that summary judgment is inappropriate because the Board has never fully determined or addressed itself to the constitutional issues raised in the representation case. We find Respondent's argument without merit. Respondent's constitutional contentions were clearly raised in its extensive brief to the Board and the Board's decision made specific reference to Respondent's church-state entanglement contention in finding "that the Quigley schools, while religiously associated, are not completely religious and are of the type over which the Board has asserted jurisdiction." Further, we cannot agree with Respondent's constitutional contention since, as more fully set forth in the recent *Archdiocese of Los Angeles* case,[5] (1) the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; (2) the

[5] *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles, a Corporation Sole, etc.*, 223 NLRB 1218 (1976).

provisions of the Act do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion of religious conduct and is necessary to obtain that objective.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[7] We shall, accordingly,

[6] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] In its answer to the complaint, Respondent denies the appropriateness of the unit. In the underlying representation proceeding, Case 13-RC-13402, Respondent litigated unit appropriateness and may not relitigate that issue here.

deny Respondent's motion to dismiss [8] and grant the Motion for Summary Judgment.[9]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is, and has been at all times material herein, an Illinois corporation and has operated two religiously oriented high schools, Quigley North and Quigley South, the only facilities involved in this proceeding. Respondent, annually, in the course and conduct of its operations of Quigley North and Quigley South, has an operating budget in excess of $1 million and has purchased goods and materials from directly outside the State of Illinois in an amount valued in excess of $65,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the

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[8] In its answer, Respondent alleges that the charge contains a declaration defective under Sec. 102.11 of the Rules and Regulations of the Board. We find no merit in this contention. Except for the absence of a date, the declaration follows Board rules. The minor discrepancy does not constitute a material defect in the charge, particularly in view of Respondent's address that the charge had been filed on December 5, 1975, and duly served on the Respondent on December 9, 1975.

[9] In view of our determination herein, we find it unnecessary to rule upon the Respondent's contention regarding the propriety of the Union's Motion for Summary Judgment.

meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Illinois Education Association is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time lay teachers, including physical education teachers employed by the Respondent at the Quigley North and Quigley South Schools, Chicago, Illinois; excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act.

2. The certification

On October 17, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Di-

rector for Region 13, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on November 3, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about November 7, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 25, 1975, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since November 25, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A.

5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Catholic Bishop of Chicago, a Corporation Sole, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Illinois Education Association is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time lay teachers, including physical education teachers employed by the Respondent at the Quigley North and Quigley South Schools, Chicago, Illinois; excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 3, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 25, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)((1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, The Catholic Bishop of Chicago, a Corporation Sole, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and con-

ditions of employment with Illinois Education Association as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time lay teachers, including physical education teachers employed by the Respondent at the Quigley North and Quigley South Schools, Chicago, Illinois; excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at Quigley North and Quigley South Schools, Chicago, Illinois, copies of the attached notice marked "Appendix." [10] Copies of said notice, on forms

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice

provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

Notice To Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

> WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Illinois Education Association as the exclusive representative of the employees in the bargaining unit described below.
>
> WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time lay teachers, including physical education teachers employed by the Respondent at the Quigley North and Quigley South Schools, Chicago, Illinois; excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act.

THE CATHOLIC BISHOP OF CHICAGO,
A CORPORATION SOLE

APPENDIX D

Diocese of Fort Wayne-South Bend, Inc. *and* Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.). Case 25-CA-7622.

June 18, 1976

DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS JENKINS AND PENELLO

Upon a charge filed on December 23, 1975, by Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.), herein called the Union, and duly served on the Diocese of Forth Wayne-South Bend, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 25, issued a complaint and notice of hearing on January 14, 1976, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 12, 1975, following a Board election in Case 25-RC-5984,

the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about September 12, 1975, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On January 23 and February 11, 1976, Respondent filed its answer to the complaint and amendment to answer admitting in part, and denying part, the allegations in the complaint.

On March 1, 1976, counsel for the General Counsel filed directly with the Board a Motion entitled "Motion To Strike Portions of Respondent's Answer and Motion For Summary Judgment." Subsequently, on March 15, 1976, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On March 29, 1976, Respondent filed a response to the Notice To Show Cause and motion to dismiss com-

[1] Official notice is taken of the record in the representation proceeding, Case 29-RC-5984, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA, as amended.

plaint,[2] memorandum in support and motion for oral argument.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding,[3] the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer, amendment to answer, response to the Notice To Show Cause and motion to dismiss complaint, and memorandum in support, Respondent denies unit appropriateness and contends in substance that it is exempt from Board jurisdiction because (1) it is a not-for-profit entity operating parochial high schools, (2) its five high schools do not meet the Board's discretionary jurisdictional standards, (3) the five high schools have only a slight impact on commerce and, therefore, the Board should decline jurisdiction, and (4) assertion of jurisdiction herein would violate the first amendment. In the motion for summary judgment, counsel for the Gen-

[2] Although the response is captioned "Response To Motion To Strike And Response In Question To Motions For Summary Judgment Made By General Counsel And Charging Party And Motion To Dismiss Complaint," the Charging Party herein did not file a motion for summary judgment.

[3] The Respondent's motion for oral argument is hereby denied as the positions of the parties are adequately set forth in their submissions in this and the representation proceedings.

eral Counsel contends that all issues raised by Respondent were litigated in the representation case and may not be relitigated here. We agree.

Review of the record, including the representation proceedings in Case 25-RC-5984, shows that, at the hearing on the representation petition, Respondent argued that jurisdiction should not be asserted because of the religious character of its high schools and that any unit should include all high school and elementary teachers, both lay and religious. In support thereof, the Respondent filed a posthearing brief detailing its unit position and its contention that assertion of jurisdiction would violate the first and fourteenth amendments. On July 17, 1975, the Acting Regional Director issued a Decision and Direction of Election in which, relying on the Board's decision in *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249 (1975), he rejected Respondent's contention that jurisdiction should not be asserted because of the religious character of the schools and found, in effect, that Respondent, with an annual budget of over $1 million with $185,000 direct annual inflow for the five high schools together, met the Board's discretionary jurisdictional standards. He also ordered an election in a single unit of all lay faculty at Respondent's five high schools and, contrary to the Respondent, included therein the department chairman and excluded therefrom elementary school teachers and nonlay teachers. Respondent filed timely exceptions and addenda thereto and its posthearing brief, constituting a proper request for review, re-

iterating its unit and jurisdiction contentions, asserting that *Roman Catholic Archdiocese of Baltimore*, *supra*, is an erroneous decision and requesting oral argument. By telegram of September 2, 1975, the Board denied Respondent's request for review on the grounds that it raised no issues warranting review and also denied the request for oral argument. The election, held on September 4, 1975, was won by the Union. On September 12, 1975, the Regional Director, in the absence of objections, certified the Union. Thereafter on October 14, 1975, Respondent filed a motion for reconsideration and for reopening of the record and to adduce additional evidence on the grounds that the interval of 1 week between the setting of the date of the representation case hearing and the hearing itself was insufficient to prepare and present evidence relevant to the constitutional issues and to Respondent's contention that its impact on commerce was slight. By telegram dated October 22, 1975, the Board denied the motion as untimely.[4]

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[4] In this proceeding, Respondent contends that the lack of sufficient time to prepare for the representation hearing constitutes a denial of due process. The record indicates that the petition was filed on June 6, 1975, and that the hearing officer on June 17 set the hearing for June 24. Respondent does not now assert that any request for postponement of the hearing was made. Further, the Respondent submitted a posthearing brief which was also filed with the Board in its request for review and in which the Respondent discussed the unit and jurisdictional issues. Finally, it was not until October 14, 1975, after it had litigated the issues raised in the representation case, that the Respondent first raised untimely the issue of the sufficiency of time to prepare its case. Accordingly, we find no denial of due process.

In its response to the Notice To Show Cause, Respondent contends that summary judgment is inappropriate because the Board has never fully determined or addressed the constitutional issues raised in the representation case. We find Respondent's argument without merit. Respondent's constitutional contentions were clearly raised in its posthearing brief and reiterated in its request for review which was denied by the Board on the grounds that the request raised no substantial issues warranting review. Further, we cannot agree with Respondent's constitutional contention since, as more fully set forth in the recent *Archdiocese of Los Angeles* case,[5] (1) the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; (2) the provisions of the Act do not interfere with religious beliefs; and (3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion on religious conduct and is necessary to obtain that objective. It thus appears that the Respondent is attempting to raise herein issues litigated and resolved in the underlying representation case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

[5] *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles, a Corporation Sole*, 223 NLRB 1218 (1976).

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, deny Respondent's motion to dismiss and grant the Motion for Summary Judgment.[7]

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Respondent is, and has been at all times material herein, a not-for-profit Indiana corporation with its principal office and place of business at Fort Wayne, Indiana, and at various other facilities in Indiana,

[6] See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941): Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[7] Having granted the Motion For Summary Judgment, we find it unnecessary to pass on the motion to strike portions of respondent's answer.

where it is engaged at said facilities in the operation of private nonprofit educational institutions. During the past 12 months, a representative period, Respondent, in the course and conduct of its operation, received a gross volume of revenue for unrestricted use exceeding $1 million and purchased and received at its Indiana facilities, goods and materials valued in excess of $50,000 directly from points located outside Indiana.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.), is a labor organiaztion within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time lay (non-religious) professional faculty members of the Respondent's five high schools, including teachers, librarians, guidance deans, moderators of student council, and all department chairpersons who are teachers, athletic directors, employees of the Respondent employed at its facilities exclusive of religious, all office clerical employees, teacher aids (part-time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards, and all supervisors as defined in the Act.

2. The certification

On September 4, 1975, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 25, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 12, 1975, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 12, 1975, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about September 12, 1975, and continuing at

all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since September 12, 1975, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Diocese of Fort Wayne-South Bend, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.), is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time lay (non-religious) professional faculty members of the Respondent's five high schools, including teachers, librarians, guidance deans, moderators of student council, and all department chairpersons who are

teachers, athletic directors, employees of the Respondent employed at its facilities exclusive of religious, all office clerical employees, teacher aides (part-time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards, and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 12, 1975, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about September 12, 1975, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Diocese of Fort Wayne-South Bend, Inc., Fort Wayne, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.) as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time lay (non-religious) professional faculty members of the Respondent's five high schools, including teachers, librarians, guidance deans, moderators of student council, and all department chairpersons who are teachers, athletic directors, employees of the Respondent employed at its facilities exclusive of religious, all office clerical employees, teacher aides (part-time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards, and all supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its five diocesan high schools copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Community Alliance for Teachers of Catholic High Schools (C.A.T.C.H.), as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time lay (non-religious) professional faculty members of the

Respondent's five high schools, including teachers, librarians, guidance deans, moderators of student council, and all department chairpersons who are teachers, athletic directors, employees of the Respondent employed at its facilities exclusive of religious, all office clerical employees, teacher aides (part-time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards, and all supervisors as defined in the Act.

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.

APPENDIX E

The Catholic Bishop of Chicago, A Corporation Sole *and* Quigley Education Association, an affiliate of Illinois Education Association, Petitioner. Case 13-RC-13402

September 16, 1975

DECISION AND DIRECTION OF ELECTION

BY MEMBERS FANNING, JENKINS, AND PENELLO

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Katherine Gerstenberger. After the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Regional Director for Region 13, this proceeding was transferred to the Board for decision. Thereafter the Employer and the Petitioner filed briefs in support of their respective positions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

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[1] The Employer filed a motion for oral argument which is hereby denied, as the record and briefs adequately present the issues and positions of the parties.

Upon the entire record in this proceeding, the Board finds:

1. The Petitioner seeks to represent certain lay professional employees of two private religiously oriented high schools Quigley North and Quigley South, located within the Archdiocese of Chicago, Illinois. The schools are operated by the Archbishop of Chicago who designates and appoints the rectors of each school. Both schools are situated within the city of Chicago, Quigley North and Quigley South being so designated northern and the other in the southern portions of the city.

The Employer contends (1) that the schools involved herein are minor seminary schools operating independently of each other and beyond the Board's purview, and (2) that assertion of jurisdiction would constitute an impermissible entanglement between the State and Church. The Board's policy is to decline jurisdiction over religiously sponsored organizations "only when they are completely religious, not just religiously associated." [2] We find no merit in the contention or that the two schools involved are minor seminary schools and therefore "completely" religious.

The record shows that prior to 1970 admissions to the schools were limited to boys 12 or 13 years of age who had a positive desire to be priests. On October 5, 1970, the Archbishop adopted a broader admissions policy opening the schools to students not exhibiting

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[2] *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 NLRB No. 54 (1975).

a positive desire to be priests, who in the judgment of their parish priests, had "the kind of character, ability and temperament which might lead to the personal discovery of a vocation to the priesthood." While this policy reflects the desires of the Church to admit those who might adopt the vocation of the priesthood, the record clearly shows that the two Quigley schools in reality operate primarily as college preparatory schools within the class over which the Board has heretofore asserted jurisdiction. The schools hold themselves out to potential students as "a secondary school . . . to educate young men of quality character, idealism, and intelligence for dedicated Christian lives of service to others, including, hopefully, vocations for many to the priesthood and religious life." At another point, the schools' literature describes Quigley South as "a metropolitan, contemporary, college preparatory, seminary high school." The schools also point out to the potential students that the overwhelming number of their graduates matriculate at either their first or second choice of colleges. Notwithstanding the number of graduates who advance into higher education, the record shows that of those students who enrolled prior to the 1970 change in admissions only 25-30 percent of the graduates matriculate at Niles College, the Diocesan Seminary College. As to the 1974 graduating class, the most recent prior to the hearing, only 16 percent of the class went on to Niles College. In addition to the fact that the academic curriculum is similar to that of other high schools, both private and public, the Quigley schools also

maintain a substantial number of extracurricular activities including interschool sports and intramural activities similar to those engaged in by students in other high schools. In these circumstances, we find that the Quigley schools, while religiously associated, are not completely religious, and are of the type over which the Board has asserted jurisdiction.

The Employer also contends that the two schools are operated independently of each other and that, inasmuch as neither school has gross income in excess of $1 million, jurisdiction should not be asserted herein. The record shows that each of these schools is under the immediate direction of a rector appointed by and responsible to the Archbishop and neither school is accountable to or under the jurisdiction of the Archdiocesan school board. The curriculum of each is basically the same, the conditions of employment of the lay teachers including fringe benefits are identical, and, unlike the other parochial schools within the Archdiocese, the Archbishop's office provides direct financial assistance to the operating costs of the two schools, approves their budgets, and administers or oversees the administration of all funds for the schools. While the two schools operate with a degree of independence from each other, the record clearly shows that the basic functions of both schools are carried out under a specifically circumscribed program emanating from the Archbishop's office and that Quigley South is an offshoot or extension of Quigley North. We therefore conclude that the two schools operate as an integrated enterprise and may

be considered as such for the purposes of assertion of the Board's jurisdiction.[3] As the operating budgets of the two schools total in excess of $1 million, and the dollar value of purchases received from outside the State of Illinois exceeds $65,000, we find that it will effectuate the purposes of the Act to assert jurisdiction in this proceeding.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 2(6) and (7) and 9(c)(1) of the Act.

4. During the course of the hearing, the parties stipulated with certain reservations that the appropriate unit should include all full-time and regular part-time lay teachers including physical education teachers, employed at the Quigley Schools; and excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act. The Employer would exclude department chairmen on the ground that they are supervisors. Petitioner contends that they should be included in the unit.

The record shows that the faculty members of each department elect on an annual basis the department

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[3] See *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools, supra.*

chairman. The term is for 1 year with the right of succession. The chairman receive no extra pay or other benefits as a result of the position and generally maintain their normal teaching hours. Although they interview new applicants for teaching jobs within their departments, this interviewing generally appears to be on a "peer group" basis with other members of the department talking to the applicant and the resulting recommendation representing a consensus of the department's faculty opinion. The record also shows that, although recommendations are made to the dean of studies, the ultimate decision as to hiring is made by the rector after consultation with the dean of studies and the director of formation, and without the presence of the department chairman. As to discipline and discharge, there is nothing in the record to show that the department chairmen have disciplined or reprimanded other faculty members or that they have recommended that any members be disciplined or reprimanded, and, as to discharge, the record shows that one department chairman recommended annually that the contract of one member of the faculty not be renewed which recommendations were rejected. In addition, the record does not support the Employer's contention that the department chairmen prepare departmental budgets, select textbooks, disburse department funds, or evaluate teachers within the department. Rather, the record shows that the department chairmen are in reality coordinators of their departments, acting as liaison between the faculty members of their departments and the

administration. In these circumstances, including the fact that they receive no additional compensation for their status as department chairmen, and continue to carry their regular teaching loads, we find that they are not supervisors within the meaning of the Act and shall, accordingly, include them in the unit.[4]

We find that the following employees of the Employer—The Catholic Bishop of Chicago, A Corporation Sole—have a sufficient community of interest to constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time lay teachers including physical education teachers employed by the Employer at the Quigley North and Quigley South Schools, Chicago, Illinois, excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act.

[Direction of Election [5] and *Excelsior* footnote omitted from publication.]

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[4] *Florida Southern College,* 196 NLRB 888 (1972). During the course of the hearing, the parties stipulated that the athletic director at Quigley South was not a supervisor.

[5] We leave the setting of the date for the election to the discretion of the Regional Director in consultation with the parties in view of the special considerations involved in conducting elections at educational institutions.

APPENDIX F

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FORT WAYNE, INDIANA

Case No. 25-RC-5984

DIOCESE OF FORT WAYNE-SOUTH BEND, INC.,[1]
EMPLOYER

and

COMMUNITY ALLIANCE FOR TEACHERS OF
CATHOLIC HIGH SCHOOLS (C.A.T.C.H.),
PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

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[1] The name of the Employer appears as amended at the hearing.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization(s) [2] involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: [3]

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[2] The Employer's annual budget for the five high schools operated by it exceeds one million dollars annually, and its annual direct inflow is about $185,000.00. The Employer's contentions that jurisdiction should not be asserted because of its religious character are rejected. *Roman Catholic Archdiocese of Baltimore,* 216 NLRB No. 54.

[3] Except as discussed below, there is not dispute concerning the unit which has no history of bargaining. There are about 158 employees in the unit.
The Employer, contrary to the Petitioner, would (1) include about 49 non-lay teachers, i.e., teachers who are members of Catholic orders, and (2) the 512 elementary school teachers. Contention (1) is rejected since the Board has held that religious teachers such as those involved herein must not be included with lay teachers. *Sexton Hill College,* 201 NLRB 1026.
Concerning contention (2), the Board has previously approved a unit of high school teachers notwithstanding that the same Employer also operated elementary schools, *Roman*

All full time and regular part time lay (non-religious) professional faculty members of the

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Catholic Archdiocese of Baltimore, supra, and has recognized that a separate community of interest may exist for a certain faculty group comprising less than all teachers, *Fordham University,* 193 NLRB 134.

The following factors indicate that the high school teachers have a separate community of interest from the elementary teachers sufficient to warrant the conclusion that they may constitute an appropriate unit: (1) Except at one school, the high schools and elementary schools are housed separately. (2) Administratively, the Employer recognizes the dichotomy between the two systems. Thus, its handbook establishes certain separate guide lines for its elementary and high schools, and there are separate Boards of Education for elementary and high schools (the elementary school analogue being called a "Council"). Moreover, parish pastors have significant authority in the operation of elementary, but not high schools. Thus, they along with others, must approve teacher contracts and discharge. Additionally, although the Employer's superintendent is responsible for processing high school teachers' pay checks, the pastor "pays the bill" for elementary teachers, who are on a separate payroll. (3) High school teachers must have a state license to teach and unlike the elementary teachers who are qualified to teach all elementary subjects, can teach only in the area for which they are certified. (4) There is virtually no contact between the two groups, and there are only limited instances where elementary teachers became high school teachers, and even in these instances, the high school principal passed upon the qualifications of the applicant. Except that some band leaders and coaches serve both high and elementary schools, there is no interchange. (5) There is no bargaining history on a broader basis, and no labor organization seeks a unit combining the two teacher groups. Accordingly, and notwithstanding the facts that (1) all teachers sign an identical contract and (2) are subject to the same pay scale (those who possess master degrees are more highly compensated), it is concluded that the unit sought by the Petitioner constitutes an appropriate unit.

Employer's five high schools, including teachers, librarians, guidance deans, moderators of student council and all department chair persons who are teachers, athletic directors; but excluding all religious, all office clerical employees, teacher aids (part time para-professionals), cafeteria workers, assistant or vice principals, business managers, nurses, custodians, guards and supervisors [4] as defined in the Act.

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[4] The Employer, contrary to the Petitioner, contends that the department chairmen are supervisors. The department chairmen teach the same number of classes as all other teachers and with one exception, receive no greater remuneration than other faculty members. They are appointed by the principal and vice principal, or can be elected by the members of the particular department. They (a) "help teachers in the respective subject area to improve the quality of teaching and curriculum", (b) "coordinate related teaching functions and activities within the area", (c) "assist" the principal in staffing the department, (d) work with the administration in the development and implementation of a unified policy concerning specific subject areas, and (e) provide a written syllabus for each course offered. Their recommendations do not appear to be effective since on the only occasions shown in the record, their recommendations were not accepted. Nor does it appear that they possess managerial duties. Although Father Seculoff, the Employer's superintendent for education for the diocese, testified "I *believe* they do it at Luers and St. Joseph, and I *think* they are part of the administrative team. . . . I don't *think* they do it at Dwenger or Marion." [Underscoring supplied.] On the other hand, Waldron, head of the English department at St. Joseph, testified that he does not regularly attend management meetings, and Rieger, chairman of the mathematics department at Bishop Luers High School, testified that he never attended any such meetings. Teacher evaluations made by them can and are also made by other members of the faculty at the election of the evaluated teacher. Depart-

DIRECTION OF ELECTION [5]

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.* Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by COMMUNITY ALLIANCE FOR TEACHERS OF CATHOLIC HIGH SCHOOLS (C.A.T.C.H.).

ment chairmen are accordingly found not to be supervisors and are therefore included in the unit herein found appropriate. The parties agreed that the athletic director at Huntington High School should be excluded since he is also a supervisor, i.e., principal.

[5] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by July 30, 1975.

/s/ John W. Hines
JOHN W. HINES
Acting Regional Director,
Region Twenty-Five

[SEAL]

Dated July 17, 1975
at Indianapolis, Indiana

* In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such a list must be received in the Regional Office, Region Twenty-five, Room 232, Federal Office

Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204, on or before July 24, 1975. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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